Supreme Court, U.S.
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No. 02-

In the Supreme Court of the United States

CINCINNATI SMSA LIMITED PARTNERSHIP,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Communications Act of 1934 provides that no "State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). The Ohio Supreme Court held that this federal statute does not preempt either a state-law claim that commercial mobile radio service ("CMRS") providers engaged in unreasonable rate discrimination or a state-law requirement that such providers maintain separate wholesale and retail business operations and records. The questions presented are:

1. Whether a state-law claim of unreasonable rate discrimination "regulate[s] * * * the rates charged by" CMRS providers within the meaning of Section 332(c)(3)(A).

2. Whether a state-law requirement that CMRS providers maintain separate wholesale and retail business operations and records "regulate[s] the entry" of such providers within the meaning of Section 332(c)(3)(A).

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Cincinnati SMSA Limited Partnership ("CLP") has one general partner, Ameritech Mobile Communications LLC, which is not publicly traded and which is an affiliate of Cingular Wireless LLC, which also is not publicly traded. The limited partners of CLP are (i) Convergys Information Management Group, which is owned by Convergys Corporation, a publicly traded company; (ii) ALLTELL Communications Investment Company, which is owned by ALLTELL, a publicly traded company; and (iii) GIT-Cell, Inc., which is not publicly traded.

Respondent is the Public Utilities Commission of Ohio.

Westside Cellular, Inc. was also a party to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App., *infra*, 1a-3a) is reported at 98 Ohio St. 3d 1463; 781 N.E. 2d 1012. The opinion and order of the Public Utilities Commission of Ohio (App., *infra*, 4a-176a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 30, 2002. App., *infra*, 1a. The court denied rehearing on February 19, 2003. *Id.* at 177a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The Communications Act of 1934 provides, in pertinent part, that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service * * * except that this * * * shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A).

STATEMENT

In 1993 Congress amended the treatment of commercial mobile radio service ("CMRS") in the Communications Act of 1934 to promote that industry's continued growth and development. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312 ("1993 OBRA Amendments"). CMRS encompasses all mobile forms of commercial wireless communication systems, including cellular, personal communication, paging, and airplane telephone service. *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services,* 9 F.C.C.R. 5408, 5416-5417 (1994).

The 1993 OBRA Amendments fundamentally changed the regulatory regime for CMRS administered by the Federal Communications Commission ("FCC" or "Commission").

Recognizing that wireless services operate without regard to state lines, Congress ensured national uniformity by preempting state "authority to regulate the entry of or the rates charged" by CMRS providers. 47 U.S.C. § 332(c)(3)(A).

In a decision flatly contrary to the congressional prohibition on state regulation of market "entry" or "rates" for CMRS, the Ohio Supreme Court held in this case that neither state-law rate discrimination claims against CMRS providers — which are premised on the alleged "unreasonableness" of the rates — nor a state-law requirement that CMRS providers maintain separate wholesale and retail operations and records — a structural requirement for entry into the market that was specifically rejected by the FCC — are preempted by Section 332.

Petitioner Cincinnati SMSA Limited Partnership ("CLP") is a CMRS provider in Ohio and adjacent states that was the subject of a complaint in the respondent Public Utilities Commission of Ohio ("the PUCO") by Westside Cellular, Inc. ("Cellnet"), a CMRS reseller. The PUCO, rejecting CLP's federal preemption arguments, concluded that CLP had violated Ohio law by failing to maintain separate wholesale and retail business operations and records and by proposing to charge Cellnet unreasonably discriminatory rates for CMRS. Cellnet was, as a result, entitled to treble damages under Ohio law.

The Ohio Supreme Court upheld the PUCO's jurisdiction to decide claims of unreasonable rate discrimination and to enforce a separation requirement for wholesale and retail CMRS operations. This decision subverts Congress's goal of establishing uniform national regulation of the "entry of" and the "rates charged by" CMRS providers, which is vital to the nation's telecommunications policy. Moreover, in conflict with decisions of this Court and lower federal and state courts, the Ohio Supreme Court turned federal preemption law upside down, authorizing state regulation — backed by the threat of treble damages — in a field that Congress has reserved to the federal government. The result will be regulatory chaos that

imperils the continued growth and development of wireless services nationwide. Review by this Court is plainly warranted.

A. Federal Regulation Of CMRS.

1. *The development of the CMRS market.*

Over the last 25 years, the wireless communication industry has grown at a remarkable rate. As of December 2002, CMRS providers had over 140 million subscribers and more than 190,000 employees in the United States. Cellular Telecomm. Indus. Ass'n, *Semi-Annual Wireless Industry Survey Results June 1985 — December 2002* (2003), http://www.wow-com.com/pdf/CTIA_Survey_Yearend_2002.pdf ("*CTIA*"). This massive and sustained growth has made CMRS an "integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587 ("*House Report*").

The growth of CMRS is largely the result of federal policies. The FCC initially licensed only one CMRS system in each market because it believed that the technical complexity and expense of providing such service would make it impossible to have multiple systems. See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, at ¶ 4 (1981). To meet heightened demand and to promote competition, however, the FCC increased the spectrum allocation in 1981 and divided it between two competing CMRS providers in each market. *Id.* at ¶ 15. The FCC exercised its authority to assert "federal primacy over the areas of technical standards and competitive market structure for cellular service." *Id.* at ¶¶ 82-83.

The premise of the federal CMRS policy has been that the industry should operate as a competitive market in which success is "driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs — and not by strategies in the regulatory

arena." *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1420 (1994) ("*CMRS Order*").

In developing this policy, the FCC specifically addressed the role of CMRS resellers. The FCC generally prohibited CMRS providers from restricting the resale of their services, requiring that "resellers must be permitted to resell cellular service under the same terms and conditions offered to retail customers." *Cellular Resale NPRM and Order*, 6 F.C.C.R. 1719, at ¶ 44 (1991) ("*Resale NPRM*"). The FCC rejected a requirement that CMRS providers establish separate wholesale and retail operations, because the Commission was "not persuaded that it would be wise policy at this time to consider the need for separate accounting for wholesale/retail operations [or] regulate wholesale rates of return." *Id.* at ¶¶ 52, 54-55.

CMRS providers are subject to the general prohibition in the Communications Act against unreasonable discrimination in rates or service. See 47 U.S.C § 202(a) ("[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges"); see also *id.* § 201(b) ("[a]ll charges * * * for and in connection with such communication service, shall be just and reasonable"). Any person damaged by a violation of these provisions may file a complaint with the FCC or bring suit in federal court. *Id.* § 207.

Until 1993, however, the regulation of CMRS rates and market entry was not entirely a federal concern. Under the Communications Act, only CMRS providers engaged in interstate (or foreign) wire or radio communications were required to file tariffs with the FCC, which the Commission was authorized to review for reasonableness. 47 U.S.C. §§ 203(a), 204(a). Intrastate wire or radio communications were subject to state regulation. Regulatory jurisdiction was thus "divided between federal and state authorities, largely along an interstate/intrastate line." *Ball* v. *GTE Mobilnet of California*, 96 Cal. Rptr. 2d 801, 804 (Cal. Ct. App. 2000); see 47 U.S.C.

§ 152(b); *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379-382 (1999).

The increasing need for a national approach to CMRS rates and market entry was dictated by the nature of this service. CMRS differs substantially from traditional home or office telephone service because wireless service is not constrained by state boundaries. Wireless service areas frequently include portions of multiple states. Furthermore, because wireless telephones are portable, they routinely are used in more than one state. A wireless call may originate in one state, the caller may drive into a second state, and the call may be routed and switched to a third state. See Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act Of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 FED. COM. L.J. 547, 550 (1998).

2. *The 1993 OBRA Amendments.*

In light of the sustained growth and interstate character of CMRS, Congress amended the Communications Act in 1993 to provide for increased uniformity nationwide in CMRS regulation. *Connecticut Dep't of Public Util. Control* v. *FCC*, 78 F.3d 842, 845 (2d Cir. 1996). The 1993 OBRA Amendments authorized the FCC to exempt CMRS from the tariff filing requirements of the Communications Act, 47 U.S.C. § 332(c)(1)(A), which the Commission did in 1994. See *CMRS Order* at ¶ 14; 47 C.F.R. § 20.15. In addition, Congress removed any state authority over CMRS rates and market entry, specifying that "no state or local government shall have authority to regulate 'the entry of or the rates charged'" for CMRS. *Petition of the People of the State of California and the Public Utilities Commission of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7487 (1995) ("*California Order*") (quoting 47 U.S.C. § 332(c)(3)(A)).[1]

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[1] The effective date for the preemption provision was delayed until August 10, 1994, to give each state an opportunity to petition the FCC for continued

Section 332 "establish[ed] a *national* regulatory policy for [CMRS], not a policy that is balkanized state-by-state." *California Order* at ¶ 24 (emphasis added). Congress eliminated unnecessary and conflicting state regulations to foster continued growth and development of CMRS. The only state authority remaining under the Communications Act is the regulation of the "terms and conditions" of CMRS other than market "entry" and "rates." 47 U.S.C. § 332(c)(3)(A). By limiting state authority, Congress "replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework" and gives the FCC "flexibility to establish appropriate levels of regulation for [commercial] mobile radio service[]." *CMRS Order* at ¶ 12.

The 1993 OBRA Amendments were "intended to promote rapid deployment of a wireless telecommunications infrastructure" backed by "[r]obust investment." *Regulatory Control of the Rates of Wholesale Cellular Service Providers*, 10 F.C.C.R. 7025, 7031-7032 (1995). The FCC "facilitate[s] the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment * * * and by establishing a stable, predictable regulatory environment that facilitates prudent business planning." *Ibid.*

To increase CMRS investment, the FCC in 1996 reconsidered its policy generally prohibiting restrictions on CMRS resale. See page 4, *supra*. The Commission decided to continue the proscription, but — because of the development of competition in CMRS — the rule was amended to eliminate this prohibition "five years after the last group of initial licenses for the broadband PCS spectrum * * * is awarded." 47 C.F.R. § 20.12(b)(3).[2] The FCC also decided (again) not to "require

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authority over CMRS rates to address unusual market conditions in the state. 47 U.S.C. § 332(c)(3)(B).

[2] The FCC announced that the prohibition on resale restrictions would end "at the close of November 24, 2002." *Commencement of Five-Year Period*

providers to structure their operations or offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures, or establish a margin for resellers, or guarantee resellers a profit." *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 F.C.C.R. 18455, at ¶ 12 (1996), *aff'd, Cellnet Communications* v. *FCC*, 149 F.3d 429 (6th Cir. 1998) ("*Resale Order*").

The creation of a uniform national regulatory regime with a focus on competition and investment in CMRS has produced enormous public benefits. In the ten years since the 1993 OBRA Amendments were adopted, the CMRS industry has attracted over $100 billion in additional capital investments. See *CTIA*, *supra*. Moreover, the FCC's recent report on CMRS competition found that significant progress has been made: "the CMRS industry continues to benefit from the effects of increased competition as evidenced by lower prices to consumers and increased diversity of service offerings." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 15 F.C.C.R. 17660, 17663 (2000).

B. Ohio Regulation Of CMRS.

1. *The regulatory requirements of Ohio law.*

Ohio has also asserted regulatory jurisdiction over CMRS. Under state statutes generally applicable to public utilities, Ohio prohibits "unreasonable" discrimination in rates or service by CMRS providers. Ohio Rev. Code § 4905.35(A) ("[n]o public utility shall make or give an undue or unreasonable preference or advantage to any person * * * or subject any person * * * to any undue or unreasonable prejudice or disadvantage."); *id.* § 4905.33(A) ("[n]o public utility shall directly or indirectly * * * charge, demand, collect, or receive * * *

Preceding Termination of Resale Rule Applicable to Certain Covered Commercial Mobile Radio Service Providers, 13 F.C.C.R. 17427 (1998).

greater or lesser compensation for any services rendered, or to be rendered, * * * than it charges, demands, collects, or receives * * * for doing a like and contemporaneous service under substantially the same circumstances and conditions * * *."); App., *infra*, 9a-11a.

The PUCO first addressed CMRS in a 1985 proceeding. See *In the Matter of the Commission Investigation into the Regulatory Framework for Telecommunication Services in Ohio,* No. 84-944-TP-COI, 1985 Ohio PUC LEXIS 44, at *1 (Apr. 9, 1985). The principal issue was whether the PUCO should regulate CMRS providers — "nontraditional telephone companies" — in a manner different from the PUCO's traditional "regulation of * * * telephone companies." *Id.* at *2.

The PUCO determined that CMRS providers are telephone companies subject to its jurisdiction, but that resellers of CMRS are not, because (unlike traditional long distance telephone resellers) they have no technical involvement in the transmission or the routing of calls. 1985 Ohio PUC LEXIS 44, at *32. The PUCO held that a CMRS retailer affiliated with a CMRS wholesaler must "maintain[] * * * a separate set of accounting records from the operations of the underlying carrier and * * * ha[ve] no involvement whatsoever in the wholesale operations of the underlying carrier 'other than as a customer on equal terms as any nonaffiliated cellular reseller.'" App., *infra*, 66a. The prohibition on unreasonable rate discrimination under Ohio public utilities law continued to apply to CMRS providers. *Ibid.*

The PUCO reconsidered its CMRS regulations in 1993. See *In the Matter of the Commission Investigation into the Implementation of Sections 4927.01 Through 4927.05, Revised Code, as they Relate to Competitive Telecommunication Services*, No. 89-563-TP-COI, 1993 Ohio PUC LEXIS 1161, at *49 (Dec. 22, 1993). The PUCO concluded that the CMRS "industry was entitled to additional regulatory relief by temporarily waiving the tariff and contract filing provisions related to services provided by the underlying wholesale carrier to its nonutility

resale or end user customers." App., *infra*, 66a. But the PUCO reaffirmed the "requirement" that a CMRS reseller's operations be "'maintained under a separate set of accounting records from the operations of the wholesale cellular provider and, [that] * * * the affiliate reseller ha[ve] no involvement whatsoever in the wholesale cellular provider's operations.'" *Id.* at 67a. This "requirement was intended to permit a subsequent review of transactions between the underlying wholesale carrier and its affiliated reseller for the purpose of ascertaining whether" there was unreasonable discrimination in favor of the affiliate. *Ibid.*[3]

2. *Ohio's petition to retain "rate" and "market entry" authority over CMRS.*

Following the 1993 OBRA Amendments, Ohio used the opportunity afforded by Congress (see note 1, *supra*) to petition the FCC to retain authority over CMRS rates and entry in the State. See *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842, ¶ 3 (1995) ("*Ohio Order*"). Congress had "provided that, if a State had 'any regulation concerning the rates for [CMRS] * * * as of June 1, 1993, it could retain its rate regulation authority by petitioning" the FCC and demonstrating, among other things, that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." *Ibid.* (quoting 47 U.S.C. § 332(c)(3)(A)).

Ohio's petition asserted that "it does not presently set rates or limit market entry" of CMRS providers. *Ohio Order* at ¶ 28. Ohio acknowledged using "its complaint authority to ensure

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[3] Six years later, the PUCO "eliminat[ed] this requirement * * * to ensure that no company will be restricted from entering the Ohio market as a result of a mandated structural organization." *In the Matter of the Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC LEXIS 745, at ¶ 41 (Dec. 16,1999) ("*Structural Order*").

that the rates of a cellular wholesaler are not unduly discriminatory, preferential to affiliates, or anticompetitively set," but stated that it "does not believe * * * [this] constitutes rate and entry regulation preempted by Section 332(c)." *Ibid.*

The FCC denied Ohio's petition, accepting at face value the State's assertion that it was not "regulating 'the rates charged' by any CMRS provider in that state as of June 1, 1993." *Ohio Order* at ¶ 31. Ohio also "failed to meet its statutory burden of showing that market conditions for the service(s) at issue fail to protect subscribers adequately from unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates." *Ibid.*

Regarding Ohio's authority over complaints against CMRS providers, the FCC noted that, "although Ohio may not prescribe, set, or fix rates in the future because it has lost authority to regulate 'the rates charged' for CMRS rates, it does not follow that its complaint authority under State law is entirely circumscribed." *Ohio Order* at ¶ 43. Section 332(c)(3) allows the States to "regulat[e] the other terms and conditions" of CMRS apart from rates and market entry. The FCC quoted (at ¶ 41) the House Report on the 1993 OBRA Amendments, which states that "the other terms and conditions" include "customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis * * *." *House Report* at 588.

The FCC found the "other terms and conditions" language "sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints" regarding consumer matters and "contractual agreements between two or more CMRS providers * * * to the extent that such review does not directly affect end-user rates." *Ohio Order* at ¶ 43. The Commission "conclude[d] generally that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation." *Ibid.* "For example, a requirement that licensees

identify themselves to the public utility commission * * * does not strike us as rate regulation, so long as nothing more than standard informational filings is involved." *Ibid.*

The FCC declined to "[e]stablish[] with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions," which would "require[] a more fully developed record than is presented by the Ohio Petition." *Ohio Order* at ¶ 42. The Commission suggested that "any interested party seek[ing] reconsideration on this issue * * * specify with particularity the provisions of the Ohio regulatory practice at issue." *Id.* at ¶ 44.

Ohio filed a petition for reconsideration. *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service*, 10 F.C.C.R. 12427, at ¶ 11 (1995) ("*Ohio Reconsideration Order*"). The State's only request, however, was "that it be permitted to supplement its petition for reconsideration at a later date with the results of an on-going complaint proceeding involving a retail cellular reseller and several wholesale cellular providers in Ohio." *Ibid.* The PUCO proceeding to which the State referred was this very case —initiated by Cellnet against CLP and other CMRS providers in Ohio (see page 2, *supra*). Cellnet alleged that "the respondents did not maintain separate accounting records for their wholesale and retail operations" and that the respondents engaged in unreasonable rate discrimination. *Id.* at ¶ 12.

The FCC denied Ohio's reconsideration petition because, among other reasons, the State did not specify "what error in the Ohio Order * * * is complained of." *Ohio Reconsideration Order* at ¶ 21. The FCC referred Ohio to the discussion of Section 332 in the House Report quoted in the *Ohio Order* (at ¶ 41) as "the best available description of the boundaries of the PUCO's authority to regulate the 'other terms and conditions' of CMRS." *Ohio Reconsideration Order* at ¶ 24. "Ohio itself [must] determine which portions of its proposed actions with respect to investigating the development of resale competition

within the cellular industry have been preempted * * *. The record of this proceeding is not sufficiently detailed to permit us to comment meaningfully on the regulatory activities contemplated by the PUCO in the Cellnet proceeding." *Ibid.*

C. The Litigation Of Cellnet's Complaint Against CLP.

1. The Cellnet complaint to which the FCC referred was filed in the PUCO in October 1993 against CLP, the New Par companies, and two other respondents (including GTE Mobilnet) that were later dismissed from the case. App., *infra*, 4a-15a. The proceedings were extended to include conduct by the respondents from 1993 to 1998. *Id.* at 10a.

Cellnet alleged that New Par had engaged in unreasonable rate discrimination by charging Cellnet more for CMRS than New Par charged its affiliated resellers. App., *infra*, 10a. Cellnet never purchased CMRS from CLP; instead Cellnet alleged that CLP had refused Cellnet's request to "make capacity available to Cellnet on a wholesale basis" at the same rates CLP charged its retail business. *Id.* at 11a. Cellnet also alleged that CLP and New Par had failed to maintain separate operations and records for their wholesale and retail businesses. *Id.* at 10a.

New Par (joined by GTE Mobilnet) filed suit in the Northern District of Ohio to enjoin the PUCO proceeding on the ground that it was preempted by Section 332(c)(3)(A). See *GTE Mobilnet of Ohio* v. *Johnson*, 111 F.3d 469 (6th Cir. 1997). In opposition to the plaintiffs' motion for a preliminary injunction, Cellnet and the PUCO "argued that requiring GTE Mobilnet and New Par to charge affiliated and unaffiliated resellers the same price was not a form of rate-setting." *Id.* at 474. The district court disagreed, "reasoning that if Congress had intended automatically to reserve to the states the authority to control discriminatory rates, Congress would not have included in the statute subsection (i), which allowed a state to petition for authority to re-regulate rates when the rates are unreason-

ably discriminatory." *Ibid.* The court preliminarily enjoined the PUCO proceeding on Cellnet's complaint. *Ibid.*

The Sixth Circuit reversed, holding that the district court should have abstained under *Younger* v. *Harris*, 401 U.S. 37 (1971), in deference to the pending PUCO proceeding in which "GTE Mobilnet and New Par will have an adequate opportunity to raise their federal preemption claims," including "[j]udicial review of a final [PUCO] order * * * in the form of a direct appeal to the Supreme Court of Ohio." 111 F.3d at 482. The court of appeals concluded that the PUCO "must be allowed to resolve th[e] preemption question" in the first instance. *Ibid.*

The PUCO determined that Cellnet's claims related to "the other terms and conditions" of CMRS and were not preempted by Section 332(c)(3)(A). App., *infra*, 60a. The PUCO then received extensive testimony and numerous exhibits on CLP's and New Par's wholesale and retail business operations, including their rates, services, and customers. *Id.* at 49a-52a.

In its opinion on the merits, the PUCO found that CLP (and New Par) had violated Ohio law by not "maintain[ing] detailed records of transactions between its wholesale and retail affiliates or records of inquiries for cellular service" and by failing to follow the PUCO's "order regarding the separation of its wholesale and retail operations." App., *infra*, 69a-71a. Because CLP did not separate its wholesale and retail businesses and maintain records of transactions between the two operations, the PUCO "assume[d] that [CLP]'s internal wholesale rate is zero." *Id.* at 94a. Using this rate for comparison, the PUCO found that "it is apparent that [CLP]'s wholesale is charging Cellnet a higher rate for service than it is charging [CLP]'s retail." *Id.* at 95a. The PUCO thus concluded that, for the years 1995 to 1998, CLP "violated Section 4905.33, Revised Code, by charging Cellnet a higher rate for doing a like and contemporaneous service under substantially the same circumstances and conditions." *Id.* at 94a The PUCO also found that New Par had engaged in unreasonable discrimi-

nation in the rates and services it provided to Cellnet. *Id.* at 108a, 121a.

The PUCO imposed no damages or monetary penalties on CLP and New Par, noting with respect to Cellnet's damages claim that it was "simply engaged in an analysis of whether respondents have violated the law. * * * [A] court of competent jurisdiction will address the issue of whether the violation results in an injury to Cellnet and the amount of damages involved." App., *infra*, 60a.

2. CLP and New Par appealed to the Ohio Supreme Court, which issued a separate opinion for each appeal. App., *infra*, 1a, 178a. In New Par's appeal, the court rejected federal preemption, erroneously stating that this "argument has been adjudicated 12 times by various tribunals and regulatory agencies, including the [PUCO] and the FCC. Heretofore, New Par has enjoyed not a single unreversed determination of federal preemption under Section 332(c)(3)(A)." App., *infra*, 180a. The court declined to "reprise an analysis of the legal requirements for federal statutory preemption of state law," and simply concluded that the PUCO's adjudication of Cellnet's complaint "was not regulation of appellants' rates under Section 332, * * * because it was 'regulating the other terms and conditions of [appellants'] commercial mobile services' * * * [and] not preempted." App., *infra*, 181a.

In CLP's appeal, the Ohio Supreme Court relied largely on its opinion in the New Par appeal to dispose of CLP's preemption defense. App., *infra*, 2a. The court specifically addressed only CLP's argument that the PUCO had "engaged in rate-setting when it determined [CLP]'s internal wholesale rate to be zero." *Ibid.* The court held that the PUCO had "merely determined that the internal wholesale rate was zero based on examinations of [CLP]'s accounting records (or lack thereof) and consideration of testimony of [CLP] witnesses. This determination did not constitute preempted rate-setting by the [PUCO]." *Id.* at 2a-3a.

3. Cellnet brought a separate action against CLP and New Par in an Ohio trial court seeking damages based on the PUCO's findings that CLP and New Par had violated Ohio law. The court rejected the defendants' arguments that Cellnet's damages claims were preempted by Section 332(c)(3)(A) of the Communications Act, concluding that the issue had been definitively resolved by the Ohio Supreme Court. The state court held that Cellnet was entitled to recover treble "damages for the discriminatory conduct of the Defendants" under Ohio Rev. Code § 4905.61. Cellnet's recovery would "include damages for overcharges, lost profits, including lost customers, * * * all of which will be trebled." App., *infra*, 193a.

The calculation of Cellnet's claim for damages was based on the PUCO's finding that CLP's "internal wholesale rate" was zero. In light of this fanciful supposition, CLP would have "overcharged" Cellnet if it had charged *anything* for CMRS. Because CLP failed to offer its services for nothing, Cellnet sought over $1 billion in damages. Faced with this massive potential liability, CLP was forced to settle the case in April 2003, before the start of trial.

REASONS FOR GRANTING THE PETITION

Section 332 of the Communications Act defines the balance of power between the states and the federal government with respect to CMRS rates and market entry. It reflects a congressional determination that federal law should preempt *all* state regulation concerning these issues. The text of Section 332 is all-encompassing and unambiguous: "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). Congress considered this provision necessary to ensure a "stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure." *CMRS Order* at ¶ 25.

Uniform national regulation of wireless rates and market entry was required because CMRS "operate[s] without regard

to state lines." *House Report* at 587. Like the radio industry, which flourished in the early 20th Century with the advent of a national regulatory regime, see *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) ("[n]o state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities"), the wireless industry has grown dramatically in the last decade under federal regulation. Since the 1993 OBRA Amendments, CMRS has become a bedrock feature of the nation's telecommunications infrastructure.

Despite the success of the federal regulatory program for CMRS, Ohio has embarked on a different course that conflicts not only with the congressional requirement of exclusive federal regulation of CMRS rates and market entry, but also with specific policy decisions by the FCC. Moreover, because CMRS providers have service areas that extend into adjacent states, the Ohio Supreme Court's affirmation of the PUCO's authority in this case has extended the State's regulatory jurisdiction into Pennsylvania, West Virginia, Kentucky, Indiana, and Michigan. The potential for conflict and confusion in CMRS regulation — the very problem Congress sought to avoid by adopting Section 332 — is palpable.

This Court should grant review to restore the "stable and predictable federal regulatory environment" sought by Congress. The Ohio Supreme Court's decision is contrary to the text of Section 332(c)(3)(A) and invalid under the Supremacy Clause. By authorizing the PUCO to adjudicate claims of unreasonable rate discrimination, the Ohio Supreme Court has authorized the PUCO to "regulate * * * the rates charged by" CMRS providers, in violation of Section 332(c)(3)(A), which expressly preempts such authority. And by allowing the PUCO to enforce a separation requirement for wholesale and retail CMRS operations, the Ohio Supreme Court has allowed the State to "regulate the entry of" CMRS providers, which is expressly preempted by Section 332(c)(3)(A).

The Ohio Supreme Court's decision also conflicts with longstanding precedents of this Court on federal preemption of state rate regulation and many federal and state court decisions on federal preemption under Section 332 of the Communications Act and other federal statutes with similar regulatory schemes. Review by this Court is plainly warranted.

I. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS

The Ohio Supreme Court began its analysis with a false premise, stating incorrectly that the preemption arguments advanced by CLP have been rejected "12 times by various tribunals and regulatory agencies, including the [PUCO] and the FCC." App., *infra*, 180a. The court accepted the PUCO's and Cellnet's mischaracterization of the holdings of the Sixth Circuit and the FCC, which had expressly declined to resolve the preemption issues presented here. Both the Sixth Circuit and the FCC deferred to the PUCO to resolve those issues in the first instance. See 111 F.3d at 482 (the PUCO "must be allowed to resolve th[e] preemption question"); *Ohio Reconsideration Order* at 12438-12439.

In fact, the Ohio Supreme Court is the only court ever to have upheld state power to regulate CMRS on the matters at issue in this case. The great weight of federal and state court authority is to the contrary.

A. Rate Discrimination Claims Are A Longstanding Form Of Rate Regulation.

1. Whether Section 332(c)(3)(A) expressly preempts the authority of the State of Ohio to decide rate discrimination claims against CMRS providers is a matter of congressional intent. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983). The analysis "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales*

v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (internal quotation and citation omitted).

Section 332(c)(3)(A) provides that "no State * * * shall have any authority to regulate * * * the rates charged by any" CMRS provider. The issue here is whether state-law rate discrimination claims "regulate * * * rates." This Court has squarely held for almost a century that such state-law claims constitute rate regulation for federal preemption purposes. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil*, 204 U.S. 426 (1907). As the Court stated in *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976), under *Abilene Cotton* an "unreasonable rate" claim is preempted where it conflicts with federal regulation of rates. See also *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 473-474 (1959) (under *Abilene Cotton*, the "crucial question of reasonableness could not be decided by the courts").

The state regulatory authority endorsed by the Ohio Supreme Court is the authority to determine whether CMRS wholesale rates are "reasonable." A claim of rate discrimination requires a comparison of the rates and services offered by a seller to different purchasers and an assessment of whether any difference in the rates is "reasonable" based on a comparison of the service provided. As this Court has recognized, "[r]ates * * * do not exist in isolation" and "have meaning only when one knows the services to which they are attached." *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (a "policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services"). Thus, the Communications Act, 47 U.S.C. § 202(a), proscribes only "*unreasonable* discrimination" in rates.

Similarly, to support a claim of rate discrimination under state law, Ohio requires proof of an "unreasonable prejudice or disadvantage," Ohio Rev. Code § 4905.35(A), or that a CMRS provider charged a higher rate "for doing a like and contemporaneous service under substantially the same circumstances and

conditions," *id.* § 4905.33(A). The PUCO must hold a hearing on any complaint against a CMRS provider "whenever reasonable grounds appear that 'any rate * * * is in any respect unjust, *unreasonable, unjustly discriminatory*, unjustly preferential, or in violation of law.'" App., *infra*, 9a (quoting Ohio Rev. Code § 4905.26 (emphasis added)).

In finding that CLP violated Ohio law in this case, the PUCO determined that CLP had offered Cellnet "a higher rate for doing a like and contemporaneous service under substantially the same circumstances and conditions" than CLP charged its retail operations — with no "proper demonstration of the basis for the disparity in treatment." App., *infra*, 94a-95a.[4] In the absence of any reasonable justification for the difference, the rate offered to Cellnet was unreasonable under Ohio law.

This state-law determination unquestionably is rate regulation. In *Abilene Cotton*, the Court reviewed a state-law claim that the rate charged for an interstate rail shipment was "unreasonable." 204 U.S. at 430. The shipper "aver[red] that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter [haul] than for a longer haul." *Ibid.* The Court held that these claims were preempted by the Interstate Commerce Act, which required the railroad to file its rate with the Interstate Commerce Commission ("ICC") and authorized the ICC to determine whether the rate was "reasonable." *Id.* at 432, 440-442. The State had no authority to assess the "reasonableness" of a filed rate and

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[4] As described above (at page 13), the PUCO found that the wholesale "rate" offered to CLP's retail business was "zero," because CLP failed to maintain the separation of its wholesale and resale businesses and failed to maintain records of hypothetical transactions between CLP's wholesale and retail operations. App., *infra*, 94a. Using zero as the basis for comparison with the rates offered to Cellnet, the PUCO concluded that the disparity in rates was unreasonable. *Id.* at 95a. The separation requirement enforced by the PUCO, however, is a regulation of the "entry" of CMRS providers and is preempted by Section 332(c)(3)(A). See pages 26-28, *infra*.

adjudicate discrimination claims, because if courts had the power "to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness * * *." *Id.* at 440.

The rule established in *Abilene Cotton* has been applied consistently by this Court in other regulatory contexts. See *Nader*, 426 U.S. at 298-300 (Federal Aviation Act). For example, in *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 301 (1988), the Court interpreted the preemptive scope of the Natural Gas Act ("NGA"). Under the NGA, the Federal Energy Regulatory Commission had exclusive "authority over the rates and facilities of natural gas companies" involved in interstate commerce. *Ibid.* The issue in the case was whether the NGA prohibited, as "rate regulation," a Michigan statute that required companies "transport[ing] natural gas in Michigan for public use" to obtain the approval of the state public utilities commission "before issuing long-term securities." *Id.* at 297. The Court held that the state statute was preempted because one of its purposes was to prevent higher gas rates, which would occur if a company took "on more equity than it needs, requiring it to charge higher rates (because equity usually requires a higher rate of return)." *Id.* at 307. The Court concluded that, "[b]y keeping a natural gas company from raising its equity level above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.' This is regulation of rates." *Id.* at 308. See also *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578-585 (1981) (states lacked authority under the NGA to determine whether a rate was "reasonable" in light of the fact that Congress "has granted exclusive authority over rate regulation to the Commission").

Thus, under this Court's longstanding precedents, "rate regulation" is defined broadly to include an assessment of the

"reasonableness" of a rate in resolving a discrimination claim. See Comment, *A Study of Federal Preemption and Its Impact on the Wireless Communications Industry: What Did Congress Really Have in Mind?*, 28 CAP. U. L. REV. 659, 677 (2000) ("*Federal Preemption*") ("rate regulation [i]s interpreted more broadly than the precise setting or determination of actual rates and encompasses those actions that are directed at ensuring reasonableness of rates as well"). Indeed, the analysis in *Abilene Cotton* has become a fundamental tenet of administrative law. See Charles H. Koch, ADMINISTRATIVE LAW AND PRACTICE, § 13.23 (2003) (under *Abilene Cotton*, allowing a "court to rule on a rate's reasonableness would undermine" federal regulatory authority over rates).

The Ohio Supreme Court plainly erred in failing to apply these precedents to the PUCO's adjudication of rate discrimination claims. Here, as in *Abilene Cotton*, the State seeks to impose its own determination of the "reasonableness" of a CMRS rate, despite the fact that Congress has removed "*any* authority" for the State to "regulate * * * rates" under Section 332(c)(3)(A). Moreover, as in *Abilene Cotton*, the State seeks to judge whether a CMRS rate is unreasonably discriminatory, despite the fact that the FCC exercises the same authority under the Communications Act. See 47 U.S.C. §§ 202, 207; see also *Federal Preemption* at 676-677 (allowing state regulation of "unreasonable rates" is inconsistent with Section 332).

2. Recent federal and state judicial and administrative decisions construe the preemptive scope of Section 332 broadly, in conflict with the Ohio Supreme Court. For example, the district court in the action brought by New Par to enjoin the PUCO proceeding held that Cellnet's rate discrimination claims were preempted. See pages 12-13, *supra*. The court relied on the congressional requirement that states must petition the FCC to "re-regulate rates when the rates are unreasonably discriminatory,"111 F.3d at 474, as proof that Congress did not intend to allow the states to decide rate discrimination claims in the

absence of a grant of authority from the FCC.[5] The Sixth Circuit disagreed with this analysis, but only to the extent that the court did not find a "'facially conclusive' claim of preemption" sufficient to divest the PUCO of authority to decide, in the first instance, the "preemption question" resolved by the district court. 111 F.3d at 480, 482.

In *Digital Communications Network, Inc.* v. *AT&T Wireless Servs.*, 63 F. Supp. 2d 1194, 1196-1198 (C.D. Cal. 1999), the court held that the California Public Utilities Commission ("CPUC") "lack[ed] subject matter jurisdiction" under Section 332(c)(3)(A) to decide claims that CMRS providers had engaged in "unjust and unreasonable practices" by failing to make certain retail service plans available to CMRS resellers. The CPUC itself had determined in several opinions that Section 332(c)(3)(A) preempts state-law rate discrimination claims. *Id.* at 1198-1199.[6] In *Digital*, the court referred the question of the "reasonableness" of the CMRS provider's rates under federal law, 47 U.S.C. §§ 201, 202, to the FCC because of the Commission's "expertise, skill, and ability to resolve the dispute." 63 F. Supp. 2d at 1199-1203. "Obtaining the views of the FCC would be instrumental to the Court in reaching its decision." *Id.* at 1202.

In a related context, the Seventh Circuit held that state-law claims based on allegations of inadequate CMRS service are

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[5] The FCC denied all seven petitions that were filed by states seeking continued authority over CMRS rates. See, *e.g.*, *Ohio Order*, *supra*; *California Order*, *supra*; *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 F.C.C.R. 7025 (1995).

[6] See, *e.g.*, *Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications*, Dec. No. 96-12-071, 1996 Cal. PUC LEXIS 1135, at *41-42 (Dec. 20, 1996). The CPUC has refused to consider a complaint that sought to require wholesale CMRS providers to offer certain services at particular rates. See *California Wireless Resellers Ass'n* v. *Los Angeles Cellular Tel. Co.*, Dec. No. 98-11-016, 1998 Cal. PUC LEXIS 793 (Nov. 5, 1998).

challenges to CMRS rates that are preempted by Section 332. In *Bastien* v. *AT&T Wireless Servs.*, 205 F.3d 983, 985 (7th Cir. 2000), a customer complained about the "quality of service" he received from his CMRS provider and filed a state suit alleging breach of contract and fraud. *Ibid.* The defendant removed the case to federal court. In considering the plaintiff's remand motion, the Seventh Circuit analyzed whether the state-law claims were preempted rate regulation under Section 332(c)(3)(A). The court concluded that the claims were preempted because, if the plaintiff prevailed, the CMRS provider would be forced either to provide better service for the same rates or to "lower [its] rates." *Id.* at 986-989.

Other courts have similarly concluded that a "claim involving inadequate service is actually an attack on rates because it implies that the service was not worth what the customer paid for it." *Bryceland* v. *AT&T Corp.*, 122 F. Supp. 2d 703, 709 (N.D. Tex. 2000); see, *e.g.*, *Ball* v. *GTE Mobilnet*, 96 Cal. Rptr. 2d 801 (Cal. Ct. App. 2000) (claim challenging calculation of airtime minutes was a preempted challenge to the provider's rates); *In re Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193 (E.D.Pa. 1996) (same).

The Ohio Supreme Court relied on the "other terms and conditions" language in Section 332(c)(3)(A) to support the PUCO's jurisdiction to hear rate discrimination claims. Several courts have held that this provision allows state-law claims based on alleged fraud or misrepresentations in the disclosures made by CMRS providers in offering services. See, *e.g.*, *Tenore* v. *AT&T Wireless Servs.*, 962 P.2d 104 (Wash. 1998); *Spielholz* v. *Superior Court*, 104 Cal. Rptr. 2d 197, 204 (Cal. Ct. App. 2001). But even the courts that allow state claims for "inadequate disclosure" regarding CMRS service conclude that Section 332(c)(3)(A) "preempts a state law action challenging the reasonableness or legality of [a] particular rate or rate practice itself." *Ball*, 96 Cal. Rptr. 2d at 810; *Spielholz*, 104 Cal. Rptr. 2d at 204 (a state-law claim that "directly challenges a rate as unreasonable * * * would directly regulate rates" and

be preempted). No court, other than the court below, has held that this provision authorizes state-law claims that have a direct impact on CMRS rates.

The FCC has emphasized that "the rates charged by" language of Section 332(c)(3)(A) should be construed broadly. See *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19,898 (1999). The FCC determined in *Southwestern Bell* that state-law claims challenging a CMRS provider's practices of rounding up airtime to the nearest minute and charging for incoming calls were preempted. *Id.* at ¶ 19. On the other hand, the FCC has interpreted the "other terms and conditions" provision in Section 332(c)(3)(A) to authorize state jurisdiction over "carrier practices, separate and apart from their rates." *Ohio Order* at ¶ 43.

Although the FCC has not finished drawing the line between preempted rate regulation and "other terms and conditions" of CMRS — and expressly declined to address the issue in advance of the PUCO's consideration of the claims asserted by Cellnet in this case, see *Ohio Order* at ¶ 42 — it is apparent in the aftermath of the PUCO proceeding on Cellnet's complaint that the State has engaged in rate regulation. The Ohio Supreme Court erred in affirming the State's authority to do so in light of the text of Section 332, the *Abilene Cotton* line of cases, the foregoing federal and state decisions interpreting Section 332, and the FCC's decisions on this issue.

3. This conclusion is supported by decisions applying a broad definition of "rate regulation" in deciding preemption claims under similar federal statutes. For example, *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3d Cir. 1987), involved the preemption provision of the Staggers Rail Act of 1980, which stated that the jurisdiction of the ICC "over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive." 49 U.S.C. § 10501(d) (1982). The defendant in *G. & T. Terminal*

imposed surcharges on all rail shipments of potatoes by the plaintiffs. The ICC had elected not to regulate the rates for rail shipments of potatoes. 830 F.2d at 1231-1232. The plaintiffs filed a complaint alleging common-law claims that the defendant's rates were discriminatory and unreasonable. *Id.* at 1232. The Third Circuit framed the issue as whether *Abilene Cotton* applied to rates that the ICC had elected not to regulate. *Id.* at 1234. The court held that a common-law claim for rate discrimination was preempted as a "remed[y] * * * with respect to rates" under the Staggers Act. The court reasoned that "recognition of a tort remedy for discriminatory rates would involve case-by-case judicial regulation of rates in the face of a decision by a regulatory agency, acting pursuant to Congressional directives, that the market is sufficiently competitive that no regulation of rates is necessary." *Id.* at 1235 n.3.

The Ninth Circuit applied the same analysis in *Alliance Shippers, Inc.* v. *Southern Pacific Transportation Co.*, 858 F.2d 567 (1988). There, a shipper purchased trailer-on-flatcar service from the railroad, which the ICC had chosen not to regulate. The shipper discovered that other shippers were receiving better rates from the railroad and sued, alleging (among other things) state-law rate discrimination claims. 858 F.2d at 568. Citing *G. & T. Terminal*, the Ninth Circuit held that the *Abilene Cotton* rule applied to preclude the state claims as preempted rate regulation. *Id.* at 569-570.

Finally, *Storer Cable Communications* v. *City of Montgomery*, 806 F. Supp. 1518, 1543 (M.D. Ala. 1992), involved the Cable Communications Policy Act of 1984, which provides that state and local governments may not "regulate the rates for the provision of cable service," except as provided by federal law. 47 U.S.C. § 543(a). The court held that a municipal ordinance prohibiting "undue preference among customers" in cable rates was "[c]learly * * * rate regulation." *Id.* at 1543.

Under these precedents, Ohio's adjudication of state-law claims of unreasonable rate discrimination against CMRS

providers would be considered rate regulation preempted by Section 332(c)(3)(A). The Ohio Supreme Court's analysis is to the contrary. If the Ohio precedent is followed by courts (and public utility commissions) in other states, it would unsettle preemption not only under the Communications Act, but also under other federal statutes that preempt state rate regulation.

B. The Ohio Requirement Of Separate Wholesale And Retail Operations And Records Is A Regulation Of CMRS "Entry" In Violation Of Section 332(c)(3)(a).

The PUCO's conclusion that CLP's rates offered to Cellnet were "unreasonable" was based on its finding that CLP's "internal wholesale rate is zero." App., *infra*, 94a. The PUCO "assume[d]" a rate of zero because CLP had violated Ohio law by not maintaining separate "wholesale and retail operations" and not "maintain[ing] detailed records of transactions between its wholesale and retail" operations. *Id.* at 70a-71a.[7]

These "requirements" of Ohio law, on which CLP's liability was premised, plainly "regulate[d] the entry of" CMRS providers in the State in violation of Section 332(c)(3)(A). The practical effect of these requirements was to preclude a CMRS provider in Ohio from lawfully selling both to resellers and directly to the public. Every CMRS provider had to establish a CMRS retail affiliate and sell its service to the public through that affiliate — and maintain careful records of the transactions between its wholesale and resale businesses.

The PUCO itself concluded that these requirements regulated market "entry," finding (in its decision suspending the requirements prospectively) that CMRS providers would

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[7] The PUCO's analysis was based on the fiction that CMRS providers in Ohio (and elsewhere) had wholesale and retail operations that could be separated. In fact, CLP and virtually every other CMRS provider in Ohio operated as unitary entities and were not divided along wholesale and retail business lines. This structure was based, at least in part, on the FCC's rejection of a requirement that wholesale and retail CMRS operations be separated. See pages 4, 6-7, *supra*.

"be restricted from entering the Ohio market as a result of [the] mandated structural organization" of separate wholesale and retail business operations. *Structural Order*, *supra*, at *4; see note 3, *supra*. Imposition of requirements that must be satisfied before a CMRS provider may legally operate in a state is, by definition, "regulat[ing] the entry" of CMRS providers.

In *Consolidated Telephone Cooperative* v. *Western Wireless Corp.*, 637 N.W.2d 699, 702 (N.D. 2001), for example, the court held that Section 332(c)(3)(A) preempted North Dakota's requirement that "a telecommunications company generally must apply for a certificate of public convenience and necessity * * * if it wishe[d] to compete with another company furnishing adequate local [service]." *Id.* at 709. Because it operated as a barrier to entry, this requirement could not be applied to CMRS providers. *Ibid.*

Similarly, the Seventh Circuit in *Bastien* reviewed state-law claims alleging, among other things, that a CMRS provider sold service to subscribers in Chicago without building the infrastructure necessary to support reliable service. 205 F.3d at 985. The court held that the claims were preempted state-law regulation of market entry because they "tread directly on the very areas reserved to the FCC: the modes and conditions under which [a CMRS provider] may begin offering service in the Chicago market." *Id.* at 989.

The decision in *Bastien* is in accord with the FCC's determination that Section 332(c)(3)(A) "completely preempts" all state authority to impose conditions on market entry by CMRS providers. The FCC rejected Ohio's petition for authority to engage in CMRS regulation because "the statutory language is not broad enough to accommodate Ohio's apparent interest in asserting authority to regulate marketplace entry by CMRS providers." *Ohio Order* at ¶ 45.

Moreover, the PUCO's requirement of separate operations and accounting for CMRS wholesale and retail services conflicts directly with the FCC's decision — for significant

policy reasons — *not* to require separate wholesale and retail operations or accounting by CMRS providers. *Resale NPRM* at ¶¶ 42-55; *Resale Order* at ¶ 12. Thus, even in the absence of express preemption under Section 332(c)(3)(A), the PUCO's requirement that CMRS providers maintain separate wholesale and retail operations and accounting would be unconstitutional under traditional conflict preemption principles. See *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992).

II. THE OHIO SUPREME COURT HAS INTRODUCED CONFUSION AND UNCERTAINTY INTO A VITAL AREA OF THE ECONOMY IN WHICH CONGRESS HAS MANDATED NATIONAL UNIFORMITY

The ramifications of the Ohio Supreme Court's plainly erroneous holding on the federal preemption questions presented in this case are profound for CLP, for the CMRS industry, for the administration of federal statutes preempting state rate regulation, and for federal preemption law generally. All of these consequences flow from the Ohio Supreme Court's ultimate decision — in irreconcilable conflict with this Court's *Abilene Cotton* line of cases — that the State has authority to decide whether a CMRS provider's rates are unreasonably discriminatory.

The PUCO's assertion of jurisdiction to decide rate discrimination claims against CMRS providers and its findings that CLP violated Ohio law by failing to separate its wholesale and retail operations and that CLP's hypothetical "internal wholesale rate" was zero were used by Cellnet to bring a treble damages action against CLP. See page 15, *supra*. Faced with over $1 billion in potential liability — based on the absurd proposition that CLP had violated Ohio law by failing to offer its service to Cellnet for nothing — CLP was forced to settle that case. But, because Ohio entertains rate discrimination claims against CMRS providers, CLP is still at risk of being subjected to similar claims by numerous other CMRS resellers who bought or merely sought service from CLP.

Any reseller who paid (or was asked to pay) any amount at all for wireless services from CLP could present a claim of discrimination based on the PUCO's finding that CLP's "internal wholesale rate" was zero. Any such reseller would also try to take advantage of the fact that there is no statute of limitations on complaints filed with the PUCO. *Competitive Retail Elec. Serv. Standards*, No. 02-565-EL-ORD, 2002 WL 31938953 (PUCO Sept. 26, 2002); Ohio Rev. Code § 4905.26. Any reseller that filed a discrimination complaint with the PUCO and received a favorable determination could seek to file an action for treble damages under Ohio Rev. Code § 4905.61.[8] Moreover, virtually every other CMRS provider in Ohio, including New Par, failed to completely separate its wholesale and retail operations and therefore will be subject to the same treble damages exposure under Ohio law. The potential effect on CMRS in Ohio and adjacent states would be devastating.

Indeed, the effects of the Ohio Supreme Court's decision will extend far beyond Ohio's borders because, as described above, the service areas for CMRS providers often include multiple states. A decision by Ohio finding that a CMRS provider's rates were unreasonable or mandating separate wholesale and retail operations would therefore have an impact in adjacent states. Those other states might have a very different assessment of the reasonableness of the CMRS provider's rates or how its operations should be structured. Conflict is inevitable.

Most states already prohibit unreasonable rate discrimination by public utilities. See, *e.g.*, Ark. Code Ann. § 23-3-119; Colo. Rev. Stat. § 40-3-102; Ga. Code. Ann. § 46-2-55. If, as a result of the decision below, other states asserted jurisdiction over CMRS rate discrimination claims, the result would be regulatory chaos. The national regulation of CMRS rates sought

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[8]A cause of action for treble damages arises when the PUCO makes a finding of rate discrimination. Ohio Rev. Code § 4905.61. A party has one year from that determination to file a complaint. *Id.* § 2305.11.

by Congress would be destroyed. And the jurisdiction of the FCC — which has repeatedly rejected state requests for regulatory authority to address rate discrimination — would be undermined. The congressional scheme of competitively set CMRS rates overseen by the FCC would be usurped by state-law rate discrimination claims.

The unsettling effect of this regulatory turmoil on the wireless industry and CMRS providers would weaken the Nation's telecommunications infrastructure. In the last ten years, under a stable federal regulatory regime, CMRS providers have attracted over $100 billion in capital investments to build a national wireless infrastructure. If the states were now free to assert jurisdiction over market entry and rates for CMRS through state-law rate discrimination claims and to impose treble damages liability for "unreasonably" discriminatory CMRS rates, the growth and investment in CMRS would be stunted.

These potential consequences flow from a fundamentally unsound decision on federal preemption by the Ohio Supreme Court. Contrary to that court's holding, claims of unreasonable rate discrimination — enforced by treble damages liability — do regulate rates, as this Court has long held. If the Ohio Supreme Court's approach were extended to other federal statutes, the authority of Congress and the federal government to limit state rate regulation would be seriously eroded.

Review by this Court is necessary to effectuate Congress's intent in devising a regulatory program for CMRS. At a minimum, the views of the FCC should be heard before allowing the Ohio Supreme Court's decision to undermine the Commission's jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2003

APPENDIX A

SUPREME COURT OF OHIO

CINCINNATI SMSA LIMITED PARTNERSHIP, A.K.A. AMERITECH, *Appellant*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO ET AL., *Appellees*.

No. 2001-1158

November 13, 2002, Submitted

December 30, 2002, Decided

OPINION

FRANCIS E. SWEENEY, SR., J.

{¶1} This is an appeal as of right. The appellant is Cincinnati SMSA Limited Partnership ("Ameritech"). The appellees are the Public Utilities Commission of Ohio ("commission") and intervenor Westside Cellular, Inc. ("Cellnet").

{¶2} Cellnet is a cellular telephone service reseller. As such, it purchases cellular service on a wholesale basis, rebrands the service, and markets it to the general public on a retail basis. On October 18, 1993, Cellnet filed a complaint in commission case No. 93-1758-RC-CSS against wholesale cellular service providers, including Ameritech. The complaint asserted that Ameritech discriminated against Cellnet. In its January 18, 2001 opinion and order ("the order"), the commission generally agreed with Cellnet's assertions and held that Ameritech, in

violation of commission orders and regulations and Ohio statutes, unlawfully discriminated against Cellnet.

{¶3} This appeal has significant similarities to the appeal in *New Par v. Pub. Util. Comm.*, 98 Ohio St.3d 277, 2002-Ohio-7245, 781 N.E.2d 1008 (the *New Par* appeal). While the appellant here is Ameritech, the appellants in the New Par appeal were multiple entities. However, the appellants in both appeals were wholesale cellular telephone service providers and were respondents in the Cellnet complaint that resulted in the order that is the subject of both appeals.

{¶4} In this appeal, Ameritech argues that the order is unlawful because (1) the commission's jurisdiction was preempted by federal law; (2) the commission's decision was not supported by evidence; (3) the commission should have sua sponte adjourned the evidentiary hearing and ordered Ameritech to produce evidence of its internal rate once it had become clear that Ameritech had failed to produce evidence of any internal rate; and (4) the commission based part of its decision on regulations that Ameritech claims are invalid because they were not properly promulgated.

{¶5} In the *New Par* appeal, we considered the first, second, and fourth issues and disposed of them in favor of the commission, finding no reversible error. As to the first issue, that of federal preemption, Ameritech in this appeal makes all the arguments made by New Par. It argues that the commission's order under Ohio law was preempted by Section 332(c)(3)(A), Title 47, U.S. Code, because the commission engaged in rate-setting when it determined Ameritech's internal wholesale rate to be zero. However, Ameritech's argument is based on a fallacy; to the extent that Ameritech's internal wholesale rate was set at zero, it was so set by Ameritech, not by the commission. The commission merely determined that the internal wholesale rate was zero based on examinations of

Ameritech's accounting records (or lack thereof) and consideration of testimony of Ameritech witnesses. This determination did not constitute preempted rate-setting by the commission. Therefore, we reject Ameritech's second additional preemption argument.

{¶6} Having rejected Ameritech's additional argument for preemption, we hereby adopt the analysis and legal conclusions set forth in our opinion in the New Par appeal to affirm the commission's order with respect to the following issues as set forth above: (1) federal preemption, (2) conclusions supported by sufficient probative evidence, and (3) validly established regulations.

{¶7} Remaining is the third issue of asserted error by Ameritech, that the commission should have sua sponte adjourned the evidentiary hearing and ordered Ameritech to produce evidence of its internal rate once it had become clear that Ameritech had failed to produce any evidence of its internal rate. Not only is Ameritech's third asserted error counterintuitive, there is no legal support for it. We reject this argument as we have rejected Ameritech's other assertions of error.

{¶8} Therefore, we affirm the decision of the commission.

Order affirmed.

MOYER, C.J., DOUGLAS, FARMER, PFEIFER and LUNDBERG STRATTON, JJ., concur.

COOK, J., concurs in judgment only.

SHEILA G. FARMER, J., of the Fifth Appellate District, sitting for RESNICK, J.

APPENDIX B

PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of
Westside Cellular, Inc. dba Cellnet, *Complainant*,

v.

New Par Companies dba AirTouch Cellular and
Cincinnati SMSA Limited Partnership, *Respondents*.

Case No. 93-1758-RC-CSS

January 18, 2001

OPINION AND ORDER

The Commission, considering the complaint filed on October 18, 1993, as amended on May 17, 1994, January 12, 1996, and July 23, 1998, the record of public hearings held on January 26, 27, and 28, February 1 through February 11, and March 1, 1999, as well as post-hearing briefs and reply briefs submitted, hereby issues its Opinion and Order.

OPINION

I. HISTORY OF THE PROCEEDINGS

On October 18, 1993, Westside Cellular, Inc. dba Cellnet (Cellnet or complainant) filed its complaint against numerous wholesale cellular providers in the state of Ohio, alleging a variety of violations of Sections 4905.22, 4905.26, 4905.33, 4905.35, and 4905.54, Revised Code. The complaint was subsequently amended on May 17, 1994, January 12, 1996, and July 23, 1998. Respondents included those wholesale providers signifying the New Par companies[1] (AirTouch Cellular), and

[1] The New Par companies include Northern Ohio Cellular Telephone Company, Akron Cellular Telephone Company, Canton Cellular Telephone Company, Lorain/Elyria Cellular Telephone Company, Cellular

the GTE entities,[2] as well as Cincinnati SMSA Limited Partnership (Cincinnati SMSA or Ameritech Mobile), and Youngstown Cellular Telephone Company.[3] Sygnet Communications, Inc. was dismissed from this proceeding with prejudice pursuant to the Commission's Entry of February 11, 1999. GTE entities were dismissed without prejudice in accordance with the Commission's Entry of August 5, 1999.[4]

This case has experienced numerous motions to dismiss resulting in significant time delays. These motions were predominantly related to jurisdictional issues pertaining to the Commission's authority to consider issues raised in Cellnet's complaint. On September 17, 1995, following a number of motions to dismiss, GTE Mobilnet Incorporated and the New Par companies filed a motion for preliminary injunction against the Commission in the United States District Court Southern

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Communications, Inc., Mansfield Cellular Telephone Company, Columbus Cellular Telephone Company, AirTouch Cellular of Ohio, PacTel Cellular of Ohio, Inc., and New Par. The Commission previously determined that, despite the fact that some of the aforementioned entities are either not currently certified public utilities or have transferred their certificates, participation of these entities is essential for the Commission's consideration of the evidence to be presented regarding the issue of the existence of separate and distinct operations. *See*, Entry on Rehearing, Case No. 93-1758-RC-CSS (August 3, 1994).

[2] GTE entities are comprised of GTE Mobilnet of Ohio LP, GTE Mobilnet of Cleveland Incorporated, Ohio RSA # 3 LP, and GTE Mobilnet Incorporated.

[3] Sygnet Communications, Inc. became the successor in interest to Youngstown Cellular Telephone Company pursuant to Case No. 96-1030-CT-ZCN.

[4] Although GTE Mobilnet entities were dismissed from this proceeding, they were afforded the opportunity to file briefs directed to matters described in the Commission's Entry of August 5, 1999. On August 18, 1999, GTE Mobilnet entities indicated that they would not submit the identified briefs.

District of Ohio (district court) alleging that the Commission is preempted by federal law from hearing the Cellnet complaint.

On November 22, 1995, the district court issued its ruling relative to the motion for preliminary injunction. The district court held that the Commission's jurisdiction over those portions of Cellnet's complaint specifically related to rate discrimination matters was preempted by the 47 U.S.C. § 332(c)(3)(A) (Section 332). The district court did indicate that the Commission could exercise jurisdiction over the complaint to the extent that it sought, among other things, relief from allegations related to the bundling of service and equipment, and relief from allegations related to the availability of capacity on a wholesale basis. The Commission filed an appeal of the district court's preliminary injunction with the United States Court of Appeals Sixth Circuit (Sixth Circuit). GTE Mobilnet Incorporated and the New Par companies filed a cross-appeal regarding the bundling claims.[5]

On January 12, 1996, in response to the district court's decision, Cellnet filed a motion for leave to file an amended complaint in order to clearly delineate the issues of the bundling of service and equipment, and the failure of GTE Mobilnet Incorporated and Ameritech Mobile to satisfactorily make capacity available on a wholesale basis. Consistent with the district court's ruling, the Commission granted Cellnet's January 12, 1996 motion for leave to file an amended complaint. The Commission stated that its decision was predicated on the fact that the complainant was only proceeding with Counts III (relating to allegations that respondents provide their affiliated resellers with a number of nonmonetary benefits which they fail to provide to Cellnet, including the bundling of free or discounted equipment), VIII and IX (which both contain

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[5] *GTE Mobilnet of Ohio et al. v. David Johnson et al.*, Case Nos. 95-4358 and 95-4359 (6th Cir.).

allegations that GTE Mobilnet Incorporated and Ameritech Mobile fail to make capacity available to Cellnet on a wholesale basis and fail to enter into contracts with Cellnet under the same terms and conditions as made available to affiliated resellers). The Commission directed that the remaining counts be held in abeyance pending final determination of any future appeals.

On April 18, 1997, the Sixth Circuit issued its decision (6th Cir. Opinion) regarding the Commission's appeal. The Sixth Circuit reversed the preliminary injunction previously issued by the district court against the Commission and rejected the entire cross-appeal of GTE Mobilnet Incorporated and the New Par companies. Specifically, the Sixth Circuit held that Section 332 does not present a facially conclusive challenge to preempt the Commission from adjudicating Cellnet's complaint. *GTE Mobilnet of Ohio L.P. et al. v. David W. Johnson et al.*, 111 F.3d 469 (6th Cir. Opinion at 16).

The Sixth Circuit concluded that Section 332's preemption of rate regulation was limited and noted that the statute reserved the regulation of "other terms and conditions" for the states. The court held that, rather than engaging in a rulemaking, the Commission's adjudication of the Cellnet complaint concentrates on matters that allegedly occurred before the filing of the complaint and requires a detailed analysis and application of Ohio law to facts that will be established. The court also concluded that the federal preemption issue could be adequately addressed in the ongoing state proceeding and that judicial review of the Commission's decision can be obtained via a direct appeal to the Supreme Court of Ohio (6th Cir. Opinion at 24). Finally, the Sixth Circuit affirmed the district court's ruling that the Commission was authorized to proceed with the bundling issues in the complaint. The court noted that bundling was one of the subjects specifically identified in the legislative history as being

part of the states' retained authority under Section 332 to regulate "other terms and conditions."

On June 23, 1997, pursuant to the Sixth Circuit's decision, the district court issued an order dissolving its prior injunction discussed above. On June 19, 1997, in response to the Sixth Circuit's decision, Cellnet filed a motion to reinstate Counts I, II, IV, V, VI, VII, and X of its January 12, 1996 amended complaint. By Entry of February 26, 1998, the Commission granted, with the exception of Count VII,[6] Cellnet's motion to reinstate its entire amended complaint and found that the amended complaint, subject to the conditions of the Entry of February 26, 1998, stated reasonable grounds.

On July 23, 1998, pursuant to the Commission's Entry of July 20, 1998, Cellnet filed its third amended complaint in this matter. This amendment was primarily filed for the purpose of adding GTE Mobilnet of Cleveland Incorporated, GTE Mobilnet of Ohio Limited Partnership, and Ohio RSA # 3 Limited Partnership (collectively GTE Mobilnet entities) as respondents to this proceeding. AirTouch Cellular and the GTE Mobilnet entities each filed its answers to Cellnet's third amended complaint on July 27, 1998; Ameritech Mobile filed its answer on August 4, 1998.

Subsequent to additional discovery and jurisdictional disputes, this matter was scheduled for hearing on January 19, 1999, pursuant to the Attorney Examiner Entry of December 3, 1998. The hearing was rescheduled for January 26, 1999, in accordance with the Attorney Examiner's Entry of January 11, 1999. Opening arguments commenced on January 26, 1999.

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[6] With respect to Count VII, the Commission found that the allegations were strictly limited to issues which would directly affect customer rates and, in addition, did not specifically allege an issue of discrimination. Therefore, the Commission did not allow for the reinstatement of Count VII of Cellnet's amended complaint.

Hearings with respect to the Cincinnati SMSA portion of this proceeding occurred on January 26, 27, and 28, and February 10, 1999. No rebuttal testimony was presented with respect to this portion of the proceeding. Briefs and reply briefs were filed by the parties on April 15 and 30, 1999, respectively. By Entry of July 7, 1999, the Commission granted Cellnet leave to file a surreply to Ameritech Mobile's reply brief. On July 16, 1999, Cincinnati SMSA requested that the Commission consider as part of the respondent's brief, the arguments made in Cincinnati SMSA's memoranda contra to Cellnet's motion for leave to file a surreply filed on June 4, 1999. The Commission finds this request to reasonable.

Hearings with respect to the New Par companies' portion of this proceeding occurred on February 1 through 11, 1999. Rebuttal testimony was sponsored on March 1, 1999. Initial briefs were filed on April 15, 1999. Reply briefs were filed on April 30, 1999.

II. THE LAW AND SUMMARY OF THE ISSUES

Section 4905.26, Revised Code, requires, *inter alia*, that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that "any rate, fare, charge . . . classification, or service, . . . rendered charged, . . . or proposed to be rendered, charged, . . . is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. . . ." Cincinnati SMSA and the New Par companies are telephone companies as defined by Section 4905.03(A)(2), Revised Code, and public utilities by virtue of Section 4905.02, Revised Code. Therefore, the companies are subject to the jurisdiction of this Commission pursuant to Sections 4905.04 and 4905.05, Revised Code. In a complaint case such as this, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 189.

Pursuant to Cellnet's third amended complaint filed on July 23, 1998, the complainant submits as follows:

In the first two counts of its third amended complaint, Cellnet alleges that the respondents do not maintain separate wholesale and retail operations, as required by the Commission's April 9, 1985 Opinion and Order in Case No. 84-944-TP-COI (84-944), *In the Matter of the Commission's Investigation Into the Regulatory Framework for Telecommunication Services in Ohio*, and the Commission's August 2, 1988 Finding and Order in Case No. 86-1144-TP-COI, *In the Matter of Phase II of the Commission's Investigation Into the Regulatory Framework for Competitive Telecommunication Services in Ohio*. In addition, the complainant alleges that the respondents refuse to provide cellular service to Cellnet at the same rates, charges, and conditions under which they provide cellular service to respondents' retail entities.

In the third count of its third amended complaint, Cellnet contends that respondents provide their affiliated resellers with a number of nonmonetary benefits which they fail to provide to Cellnet, thereby, substantially reducing the cost of service to respondents' affiliated resellers. In addition, Cellnet contends that respondents bundle free or discounted equipment in conjunction with the end user purchase of service but do not make such equipment available to Cellnet.

In the fourth count of its third amended complaint, Cellnet alleges that respondents cross-subsidize their retail operations with profits generated by their wholesale operations for the purpose of destroying competition. It is Cellnet's contention that this cross-subsidization results in respondents' retail operations being able to provide service to the public at an amount lower than their cost. Cellnet

alleges that such conduct is in violation of Sections 4905.22, 4905.33, and 4905.35, Revised Code.

In the fifth count of its third amended complaint, Cellnet alleges that the respondents offer to their affiliated resellers certain retail rate plans which are below the wholesale rates available to Cellnet.

In the sixth count of its third amended complaint, Cellnet alleges that AirTouch Cellular charges Cellnet for roaming at a higher rate than they charge their other customers and is, therefore, in violation of Sections 4905.22, 4905.33, 4905.35, and 4905.54, Revised Code, as well as the 84-944 and 86-1144 Orders.

In the ninth count of its third amended complaint,[7] Cellnet alleges that Ameritech Mobile has failed to make capacity available to Cellnet on a wholesale basis in violation of 47 U.S.C. § 332(c)(3)(A), and failed to enter into a contract with Cellnet under the same terms and conditions as made available to its affiliated resellers.

Finally, in the tenth count of its third amended complaint, Cellnet alleges that, as a result of the aforementioned activities, respondents have placed Cellnet at a disadvantage in the markets in which it operates, as well as prohibiting Cellnet from entirely competing in a number of markets served by respondents. Cellnet believes that such conduct has resulted in real and substantial economic injury and has damaged the ability of Cellnet to operate in the state of Ohio.

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[7] As noted above, the seventh count of Cellnet's complaint was not reinstated by the Commission. The eighth count of the complaint is no longer applicable due to the voluntary dismissal of GTE Mobilnet entities.

III. SUMMARY OF THE EVIDENCE

A. Cellnet/Ameritech Mobile

As previously referenced above, hearings with respect to the Cellnet/Ameritech Mobile portion of the proceeding took place on January 26, 27, and 28, and February 10, 1999. Cellnet presented the following seven witnesses: (1) Jay Ellison, on cross-examination, (2) Mike Tricarichi, (3) Thomas Deuber, (4) Bernardo Fernandez, Jr., (5) Alan Ferber, on cross-examination, (6) Michael Franz, on cross-examination, and (7) Gilbert Wolf, on cross-examination. Ameritech Mobile presented: (1) Dan Fowler and (2) Kenneth Blackwell.

1. Jay Ellison

From 1992 to April 1995, Jay Ellison served as regional vice-president, marketing manager for Ameritech Mobile Communications, Inc., which is the parent company of the general partner of Cincinnati SMSA (the Ameritech affiliate which is the certified commercial mobile radio service provider for southern Ohio) (Ameritech Ex. 1; Ameritech Ex. 2; Tr. I, 58, 74, 76). Mr. Ellison's responsibilities included authority over Cincinnati SMSA's Ohio operations, including both retail and wholesale operations (Tr. I, 59). Mr. Ellison supervised Mr. Anthony Schrader who was the area manager responsible for Cincinnati SMSA's indirect distribution which included resellers (*Id.* at 61). As of the time of the hearing, Ameritech Mobile maintained a "channel" that is specific to resellers (*Id.* at 72).[8] Mr. Ellison testified that resellers provide an opportunity for Ameritech Mobile to get more business in the Ohio market (*Id.* at 67).

While Mr. Ellison recalls being informed of Cellnet's desire to become a reseller of Cincinnati SMSA service in 1994, he

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[8] As of the time of the hearing, Mr. Alan Ferber was the general manager of this channel.

does not recall how the inquiry was specifically addressed (*Id.* at 62). Further, Mr. Ellison acknowledged that he did not maintain any records with respect to Cellnet's inquiries with Cincinnati SMSA. Mr. Ellison also acknowledged that during the time that he was regional vice-president, he was unfamiliar with the requirements of the Commission's October 22, 1993 Finding and Order issued in Case No. 89-563, *In the Matter of the Commission's Investigation Into Implementation of Sections 4927.01 Through 4927.05, Revised Code, as They Relate to Competitive Telecommunication Services* (*Id.* at 63, 64).

Mr. Ellison discussed Ameritech Mobile Business Concepts (AMBC) which was identified as a rate plan available to both resellers and large corporate customers. The plan is a tiered pricing plan, which provides for an increased volume discount as usage increases. The one major distinction identified between the application of AMBC for wholesale and retail customers was the fact that retail customers received a $ 200 rebate for equipment while resellers received a credit (*Id.* at 68, 69, 75, 77).

2. Mike Tricarichi

Mr. Tricarichi, President of Cellnet, testified that Cellnet has been in existence since July 1991. Cellnet has retail stores located in Cleveland and Columbus, as well as dealers covering Cincinnati, Dayton, Mansfield, Akron, and Canton (*Id.* at 143). He described Cellnet as a reseller that provides the same service as a facilities-based commercial mobile radio services entity, while not owning the network itself. Resellers, unlike dealers/agents of a facilities-based entity, provide their own marketing, customer, and billing service (*Id.* at 83, 84).

Cellnet, in 1993, contacted Ameritech Mobile with respect to becoming a reseller of cellular service. Specifically, Mr. Tricarichi attempted to schedule a meeting with Tony Schrader of Ameritech Mobile; however, such a meeting never

transpired (*Id.* at 87, 89, 90). Mr. Tricarichi also engaged in discussions with Ricardo Tostado of Ameritech Mobile regarding scheduling a meeting to discuss the possibility of Cellnet reselling Ameritech Mobile service (*Id.* at 92).

Mr. Tricarichi described the various service plan options that were eventually offered to Cellnet. Specifically, these proposals are summarized in Cellnet Exhibits 3 and 4 for the time period commencing September 1995 and Cellnet Exhibit 5 for the time periods commencing in 1998. These rates were identified as Ameritech Mobile's reseller rates, or AMBC rates (*Id.* at 101, 102). According to Mr. Tricarchi, Cincinnati SMSA represented that, in accordance with the terms and conditions of Cellnet Exhibits 4 and 5, service would be extended consistent with Level 4 rates on the pricing plans (*Id.* at 176).

Mr. Tricarchi sponsored a number of exhibits[9] that describe promotions or service offerings allegedly extended to Ameritech Mobile retail customers. Through these exhibits, Cellnet attempted to establish that the terms and conditions of these retail offerings[10] were the same or more desirable than those offered to Cellnet as a wholesale customer pursuant to the proposed contracts in Cellnet Exhibits 4 and 5. Consequentially, Cellnet surmises that Cincinnati SMSA has charged its affiliated retail arm lower rates than those offered to Cellnet. Cellnet asserts that, pursuant to Ameritech Mobile's alleged wholesale/retail pricing structure, Cellnet cannot compete with Ameritech Mobile's retail prices and still be profitable (Tr. I, 106, 135). Therefore, Cellnet is requesting that Cincinnati SMSA be required to treat Cellnet in the same manner (including the same rate) as Ameritech Mobile's retail

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[9] The specific exhibits include Cellnet Exhibits 6, 10, 13, 14, 16, and 17.

[10] These terms and conditions relate in some manner to the following charges: (1) monthly recurring, (2) airtime, (3) features, (4) roaming, (5) toll, (6) directory assistance, and (7) equipment.

arm (*Id.* at 155, 169, 170).[11] Mr. Tricarchi also testified that Alan Ferber, the regional general manager of wholesale operations for Cincinnati SMSA, previously stated that Ameritech Mobile's cellular operations are not structured similar to the diagram depicted on Cellnet Exhibit 34 in which Ameritech Mobile sells wholesale service to affiliated and nonaffiliated customers pursuant to the same rates, terms, and conditions (*Id.* at 177).

With respect to Cellnet's own operations, Mr. Tricarchi acknowledged that it modifies its service offerings from time-to-time and that certain of its service offerings require that customers meet minimum service levels in order to be eligible for service (*Id.* at 145, 146).

3. Thomas Deuber

Mr. Thomas Deuber, Vice-President of Lane Aviation Corporation (Lane Aviation) testified regarding the company's participation in Ameritech Mobile's Franklin County cellular retail pricing plan (Franklin County plan) identified by Cellnet Exhibit 10. Lane Aviation is a privately funded entity involved in the provision of aviation services to the airline industry and to corporate and general aviation, including the Columbus Municipal Airport Authority (Tr. II, 10). Lane Aviation leases space at the Port Columbus International Airport (Port Columbus) from the Columbus Municipal Airport Authority (*Id.* at 11). Lane Aviation also has a location at Rickenbacker Air Force Base (Rickenbacker) which is under the auspices of the Inland Port Authority (*Id.* at 12). Mr. Deuber identified the Columbus Municipal Airport Authority as a governmental entity authority (*Id.* at 17).

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[11] Similarly, Mr. Tricarchi believes that Ameritech Mobile should not extend volume discounts to its affiliated retail arm unless another resale customer is capable of availing itself of it (Tr. I, 182).

Mr. Deuber stated that all but one of the telephones covered by the cellular bills reflected in Cellnet Exhibit 10 encompass cellular telephones utilized at Port Columbus. The one other telephone is associated with Lane Aviation's Rickenbacker operations. In 1996, Lane Aviation decided to provide cellular phone service for team captains responsible for overseeing the fueling operations at Port Columbus and Rickenbacker. Mr. Deuber acknowledged that the phones are also used for personal, nonbusiness calls as well (*Id.* at 14).

4. Bernardo Fernandez, Jr.

Mr. Fernandez operates a telecommunications consulting company that attempts to negotiate or renegotiate cellular rates for retail cellular subscribers. Mr. Fernandez testified that he has negotiated new contracts, as well as renegotiated existing contracts (some were about to expire and others were not scheduled to expire) with Ameritech Mobile's retail arm on behalf of subscribers (*Id.* at 21, 60-63). Mr. Fernandez recounted discussions which he had with Ameritech Mobile's retail arm regarding Lane Aviation's participation in the Franklin County retail pricing plan with no monthly recurring fee and airtime charges of $ .22 peak airtime and $ .10 off-peak airtime (*Id.* at 11, 23). Specifically, Mr. Fernandez indicated that at least one Ameritech Mobile retail representative stated that any employee of Lane Aviation could enroll in the Franklin County pricing plan (*Id.* at 25, 29, 61).

Mr. Fernandez further testified that he was successful in obtaining the Ameritech Mobile government rate plan,[12] as well as additional credits for a number of individuals who Ameritech Mobile's retail arm was aware had no connection whatsoever to a governmental entity and had minimal cellular usage (*Id.* at

[12] Mr. Fernandez described the Ameritech Mobile government rate plan as $ 11.75 per month, peak charges of $ .20/minute, and off-peak charges of $ .10/minute.

31, 34, 37-39, 41, 43-45, 70, 72). These contracts occurred during the 1997-1998 time frame. Mr. Fernandez acknowledged that cellular retail industry is a very competitive business and companies are interested in retaining customers (*Id.* at 63, 65).

5. Alan Ferber

Alan Ferber, at the time of the hearing, was the regional general manager of wholesale operations for Cincinnati SMSA. Mr. Ferber stated that, among his job duties, he is responsible for managing the relationship between the wholesale side (Cincinnati SMSA) and the nonaffiliated resellers (Tr. II, 75).[13] This would include being involved, in conjunction with Gilbert Wolf (controller of Cincinnati SMSA) and a representative from the marketing section, in the establishment of the rate that is charged by Cincinnati SMSA to nonaffiliated resellers (*Id.* at 76). Mr. Ferber described the factors utilized in setting the wholesale rate to nonaffiliated resellers. These factors include analyzing the potential impact of the wholesale rate on Ameritech Mobile's retail activations (*Id.* at 78, 105).

Mr. Ferber disputed that the AMBC matrix is the price initially offered to resellers. Rather, Mr. Ferber provided that the reseller matrix is the applicable analog wholesale reseller rate, as contained in Ameritech Mobile Exhibit 8, Attachment 1-G (*Id.* at 93, 94). The AMBC matrix, Ameritech Mobile Exhibit 8, Attachment 1-H, is applicable only in the event that a reseller does not reach the 250,000 minute per month level within two years. A similar pricing structure exists for digital resale as well (*Id.* at 94, 95). When comparing Ameritech Mobile Exhibit 8 with Cellnet Exhibit 5, Mr. Ferber concluded that the rates and material terms and conditions are identical.

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[13] Mr. Ferber indicated that there are approximately ten Ameritech Mobile resellers in Ohio with a customer base. Some of these commenced operations in the early 1990's (Tr. II, 87).

The only minor differences involve the addition of the Indianapolis market to the Ameritech Mobile Exhibit 8 and some descriptive language changes, and the applicable commencement date (summer of 1998 v. fall of 1998) (*Id.* at 124).

With respect the wholesale paradigm described in Cellnet Exhibit 34, Mr. Ferber indicated that there is no identifiable rate that is charged from the Cincinnati SMSA wholesale-side to the Ameritech Mobile affiliated retail arm. Mr. Ferber further indicated that Ameritech Mobile's wholesale/retail operations are not structured in the manner described in Cellnet Exhibit 34 for the purposes of sales and marketing (*Id.* at 81, 82, 103).[14]

Mr. Ferber described the internal structure of Cincinnati SMSA's resale operations and provided an overview of the process and the regional contracts utilized by resellers interested in establishing a resale arrangement with Ameritech Mobile (*Id.* at 86-95). With respect to the resale of features, Mr. Ferber indicated that, as evidenced by Cellnet Exhibit 4, all of Cincinnati SMSA's features are available for resale. With respect to promotions, Mr. Ferber represented that, pursuant to Ameritech Mobile Exhibit 7, resale promotions follow the same time lines as Ameritech Mobile's retail promotions and are available to the reseller at a discount (*Id.* at 98). With respect to equipment, Mr. Ferber represented that a reseller can buy equipment on the same terms and conditions as an Ameritech Mobile affiliate (*Id.* at 100).

In regard to Cellnet's desire to resell Cincinnati SMSA service, Mr. Ferber explained that he first spoke with Cellnet in the middle of 1998 with respect to the southern Ohio region

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[14] Mr. Ferber distinguished sales and marketing operations from accounting purposes (Tr. II, 81).

(Columbus, Cincinnati, and Dayton markets) (*Id.* at 101).[15] Mr. Ferber opined that Cellnet and Ameritech Mobile retail are not similarly situated entities. Rather, he identified significant differences with respect to volume, credit history, and credit position (*Id.* at 103).

6. Michael Franz

Since 1989, Mr. Franz has held a number of positions with Cincinnati SMSA. At the time of the hearing, he was the general manager of financial operations for Ameritech Mobile and Paging Services. Upon reviewing the Cincinnati SMSA's general ledgers from 1993 through 1998 (Cellnet Ex. 40), Mr. Franz explained that each account in the general ledger is designated as either a wholesale operation or a retail operation, or both a wholesale and retail operation (Tr. III, 14, 15). Mr. Franz acknowledged that Cincinnati SMSA does not maintain any accounting records which would provide the rate which Ameritech Mobile wholesale charges Ameritech Mobile retail for cellular service (*Id.* at 16, 17). Mr. Franz referenced the fact that Cincinnati SMSA previously attempted to demonstrate a charge to be made between Ameritech Mobile's wholesale and retail operations but the analysis was never completed (*Id.* at 18).

Mr. Franz testified that the annual reports filed by Cincinnati SMSA with the Commission do not reflect any transactions between Cincinnati SMSA and Ameritech Mobile's affiliated retail arm. However, during the early 1990s, the annual reports reflected charges to nonaffiliated resellers and some corporate account customers (*Id.* at 21, 33).

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[15] Mr. Ferber also indicated that Cellnet subsequently contacted him with respect to Ameritech's Cleveland PCS market.

7. Gilbert Wolf

Since 1985, Mr. Wolf has held numerous positions within Cincinnati SMSA including pricing manager. At the time of the hearing, he served in the capacity of controller. Mr. Wolf acknowledged that when setting retail pricing for the southern Ohio market, he did so in the absence of knowing the costs assessed by Ameritech Mobile wholesale to Ameritech Mobile retail (Tr. III, 39). Mr. Wolf also acknowledged that he was unaware of anyone within Ameritech Mobile that knows the rate that is being charged to Ameritech Mobile's retail arm (*Id.* at 57).

With respect to AMBC pricing, Mr. Wolf stated that AMBC pricing was not introduced until 1991. From 1991 until sometime in 1997 or 1998, Mr. Wolf stated that both resellers and corporate accounts were availing themselves of AMBC matrix pricing (*Id.* at 41-43; Ameritech Reply Br. at 23). Thereafter, resellers were able to receive service pursuant to the reseller matrix included as part of Ameritech Mobile Exhibit 8 (Tr. III, 55).

8. Dan Fowler

As of the time of the hearing, Mr. Fowler was an area vice-president for Ohio sales responsible for sales relative to three retail channels: company-owned sales, dealer/agent sales, and business-to-business sales (*Id.* at 59). Mr. Fowler described the Franklin County plan as a pricing plan developed in response to a bid invitation to provide service to Franklin County and affiliates of the county (*Id.* at 60). Mr. Fowler stated that other government plans include a municipal and federal offering (*Id.* at 63). Mr. Fowler also generally discussed the availability of a retail or published plan, as well as special rates for associations and companies in response to a competitive situation (*Id.* at 62). Mr. Fowler indicated that he does not take

wholesale pricing into account when developing the aforementioned special retail plans (*Id.* at 72).

Under the context of the Franklin County plan, Mr. Fowler indicated that both Ameritech Mobile and Franklin County could agree to extend the Franklin County plan to any affiliate of the county, including Lane Aviation. There is no evidence to establish how Lane Aviation was added to the Franklin County plan (*Id.* at 70). In the Lane Aviation scenario, Franklin County would retain ultimate responsibility for payment of the Lane Aviation bill (*Id.* at 65).

9. Kenneth Blackwell[16]

As of the time of the hearing, Dr. Blackwell was a professor of marketing at The Ohio State University. Dr. Blackwell stated that in developing his testimony he applied general principles of competition and marketing to his understanding of the cellular market (Tr. XI, 55, 56). Dr. Blackwell also relied on cellular industry information contained on the TeleCom Resale Industry Association website, as well as the FCC's Second Annual Report to Congress, *In the Matter of the Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 1997 FCC LEXIS 1513 (March 25, 1997). He acknowledged that he did not review previous FCC decisions regarding the state of competition in the cellular industry (Tr. XI, 42-44).

Through his testimony Dr. Blackwell attempts to explain why it is critical in a competitive market, or a market seeking to become fully competitive, that the provider of goods and services be able to tailor its offerings to meet the ever changing

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[16] Dr. Blackwell was sponsored by Ameritech Mobile, as well as the other respondents in this matter (Tr. XI, 6).

demands of the consumer and respond to competition (Jt. Respondents Ex. 1, at 4). Dr. Blackwell believes that limiting a company's ability to respond to customer needs (*i.e.*, services and/or price) is anticompetitive and inefficient (*Id.* at 5). Specifically, Dr. Blackwell contends that the use of customer-specific concessions[17] is appropriate in order to keep existing customers and increase respective market shares (*Id.* at 10).

With respect to the wholesale market, Dr. Blackwell does not believe that all customers are alike. Rather, Dr. Blackwell believes that the following issues should be considered when determining the prices to be offered at the wholesale level: (1) volume, (2) duration, (3) creditworthiness, (4) payment terms, and (5) market coverage (*Id.* at 22).

Dr. Blackwell acknowledges that his testimony does not address the following issues: (1) whether joint respondents have maintained separate accounting for their respective retail and wholesale accounting operations between 1991 and the present; (2) whether the rates, terms, and conditions offered to Cellnet are the same as those offered by the joint respondents to their own affiliated retail operations between 1991 and the present; (3) whether the rates, terms, and conditions offered to Cellnet by the joint respondents are the same as the rates, terms, and conditions offered to respondents' own end users between 1991 and the present; (4) whether joint respondents' wholesale operations subsidized their respective retail operations between 1991 and the present; (5) whether the joint respondents' retail operations had any involvement whatsoever in the operations of their respective wholesale operations between 1991 and the present; and (7) whether joint respondents denied service in any way between 1991 and the present (Tr. XI, 9, 10).

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[17] Rates and service offerings which fall outside of existing plans or promotions

B. Cellnet/AirTouch Cellular

As previously referenced above, hearings with respect to the Cellnet/AirTouch Cellular portion of the proceeding took place on February 1, 1999 through February 11, 1999. Cellnet presented the following nine witnesses: (1) Mike Tricarichi, (2) Robert M. Ferguson, (3) David Rudiger, (4) Stephen Nemec, (5) DalAnn Martin on cross-examination, (6) Penny Burlison on cross-examination, (7) Jack E. Roettenberger on cross-examination, (8) Michael Yoder on cross-examination, and (9) Bernie Fernadez, Jr.[18]

AirTouch Cellular presented the following eight witnesses: (1) Patrick J. Bennett, (2) David A. Shanks, (3) Terry A. Tindel, (4) Seamus Hyland, (5) Douglas E. VanScoy, (6) Diane Koskey, (7) Roger D. Blackwell, and (8) Thomas Minardo.

1. Mike Tricarichi

Mr. Tricarichi testified that he was previously a retail agent of Cellular One (Northern Ohio Cellular Telephone Company or NOCTCO or AirTouch)[19] from January 1985 through November 1988 (Tr. IV, 41). In early 1990, Mr. Tricarichi contacted NOCTCO regarding the possibility of becoming a reseller in the northern Ohio area.[20] He described Cellular

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[18] Cellnet also introduced the depositions of Barcley Knapp (Cellnet Ex. 200), Leigh Wood (Cellnet Ex. 201), Kimberly Liston (Cellnet Ex. 202), Raymond DiThomas (Cellnet Ex. 203), Alan Pearce (Cellnet Ex. 204), Robert Williams (Cellnet Ex. 205), and Greg Gorelick (Cellnet Ex. 206).

[19] CCI is the parent of NOCTCO (Tr. IV, 70). From 1991 to 1996, the CCI subsidiaries operated under the Cellular One name. Pursuant to a merger in 1996, the retail operations were then provided pursuant to the AirTouch trade name (*Id.* at 246).

[20] Cellnet became a reseller of AirTouch cellular service in Cincinnati in late 1993 or early 1994 and in Columbus in 1993 (*Id.* at 246, 265). In addition to the Cleveland, Cincinnati, and Columbus markets, Cellnet also resells

One's initial proposal in April 16, 1990, as an offer, pursuant to the applicable wholesale tariff, to provide a twenty-percent discount off both the recurring monthly charge and per minute usage fees (*Id.* at 46). Mr. Tricarichi believed that the proposed rates were the same or higher than the rates available in the retail market place at that time (*Id.* at 49, 56).[21]

In the context of the resale agreement negotiations with NOCTCO, Cellnet contends that a representative of the respondent, in July 1990, acknowledged that he was not aware of any wholesale and retail separation for the company (*Id.* at 59). NOCTCO and Cellnet reconvened negotiations of a resale agreement in March 1991 and ultimately agreed on resale rates contained in Cellnet Exhibit 101 (*Id.* at 65).[22] In April or May of 1991, Cellnet and NOCTCO continued to negotiate other terms and conditions. These issues included Cellnet's desire to participate in a cellular phone rental program similar to that, which was offered to NOCTCO's retail customers (*Id.* at 68, 138). In regard to the phone rental program, Cellnet represents that this phone rental program was terminated for new Cellnet accounts in December 1993/January 1994 time frame (*Id.* at 130, 145). However, pursuant to Cellnet Exhibit 111, the complainant believes that NOCTCO continued to maintain a rental program for its new retail customers beyond the December 1993/January 1994 time frame (*Id.* at 135, 147). The loss of the NOCTCO rental program added additional expenses for Cellnet in order to still provide rental phones to its

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AirTouch cellular service in Akron, Canton, Mansfield, and Dayton (*Id.* at 248).

[21] Specifically, Mr. Tricarichi referred to various retail association plans existing at that time, as incorporated in Cellnet Exhibit 102 (*Id.* at 52, 53).

[22] Cellnet Exhibit 101 contains both the initial rates to be charged Cellnet for a month or two beginning in July 1991 and the rates which were ultimately to become effective pursuant to NOCTCO's tariff (*Id.* at 86).

customers (*Id.* at 147). The parties also discussed a possible limit on the number of customers, which Cellnet could convert from NOCTCO's retail operations (*Id.* at 68). Subsequent meetings addressed the issues of implementation of resale and billing (*Id.* at 68). Cellnet commenced its cellular resale operations in July 1991 in the northern Ohio region (*Id.* at 42)

With respect to billing, Mr. Tricarichi indicated that, although NOCTCO was providing billing services to its affiliated retail arm, he was informed in April or May 1991 that it could not provide similar services to Cellnet (*Id.* at 75). Mr. Tricarichi testified that, although the tariff depicted in Cellnet Exhibit 101 allowed for the provision of billing services at $ 2 per directory, NOCTCO refused to provide these services to Cellnet (*Id.* at 83).

Pursuant to Cellnet Exhibit 104, a tariff filing for CCI RSA Inc., Cellnet alleges that in July or August of 1991, it discovered that AirTouch Cellular was offering volume discounts in addition to those discounts offered under the association plans. As a result, Cellnet alleges that the association retail customers were receiving a rate lower than that offered to Cellnet on a wholesale basis (*Id.* at 90). Mr. Tricarichi stated that AirTouch Cellular ultimately agreed to tariff the volume discounts in order to make the discounts available to Cellnet as well (*Id.* at 94).

Mr. Tricarichi also identified a number of AirTouch Cellular pricing plans that Cellnet subsequently became aware of after it commenced service in July 1991. These include the OAR Communicator Program and the Ohio Bell Communications Plan (Cellnet Ex. 109). These plans allegedly offered retail rates (either minutes of use or monthly recurring charges) which were below the rate paid by Cellnet to AirTouch Cellular (Tr. IV, 99, 118). Mr. Tricarichi testified that pursuant to Cellnet Exhibits 106 and 107, the OAR Communicator

Program was offered at least from July 1992 to November 1992. He alleged that, in addition to lower rates, the OAR Communicator Program and the Ohio Bell Communications Plan offered free retail features, which were not similarly available to Cellnet (*Id.* at 101, 120).

Mr. Tricarichi described how on April 1, 1993, AirTouch Cellular informed Cellnet that the volume discounts, which had been available since 1991, were being discontinued and being replaced by a nonretroactive rate plan[23] with a higher monthly recurring charge and a lower minute of use charge, as evidenced by Cellnet Exhibit 108 (*Id.* at 112). Mr. Tricarichi testified that, subsequent to discussions with AirTouch Cellular regarding the rates contained in Cellnet Exhibit 109, AirTouch Cellular revised its wholesale rates in accordance with Cellnet Exhibit 110.[24] Concurrent with this offering Mr. Tricarichi testified that AirTouch Cellular filed an additional rate plan with the Commission (*Id.* at 125). This rate plan contained lower recurring and nonrecurring rates than that offered to Cellnet in Cellnet Exhibit 110. This rate plan was identified as a special promotional offering and was limited to wholesale customers with 100,000 combined access numbers in specified markets. Mr. Tricarichi concluded that no reseller could satisfy the 100,000 combined access line requirement (*Id.* at 126).

In regard to the issue of roaming, Mr. Tricarichi explained that, between 1991 and the beginning of 1993, Cellnet was charged $ .35/minute when a Cellnet customer roamed in another AirTouch Cellular market. Roaming in other areas

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[23] Nonretroactive signifies a wholesale pricing plan whereby pricing is determined on a per line basis rather than consolidating all of the minutes of use for a wholesale customer (Tr. VII, 70).

[24] These rates were allegedly in effect from August 16 to November 30, 1993, but were applicable to Cellnet for a period of about two years (Tr. IV, 123).

resulted in different charges depending on the carrier involved (*Id.* at 161). Based on the witness' understanding of the respondents' financials (Cellnet Ex. 103), he does not believe that AirTouch Cellular was billing its retail affiliates for the provision of roaming service for the time period prior to 1993 (Tr. IV, 162). Pursuant to Cellnet Exhibit 118, Mr. Tricarchi asserts that beginning February 1, 1993, NOCTCO increased Cellnet's rates to $ .60/minute for roaming in some markets. Pursuant to Cellnet Exhibit 119, sometime around August 1994, AirTouch Cellular increased Cellnet's rates to $ .70/minute for roaming in some markets. In both cases, Cellnet contends that AirTouch Cellular did not similarly increase the roaming rates of its retail customers (*Id.* at 164, 169).

Mr. Tricarichi also discussed the wholesale and retail plans offered by AirTouch Cellular beginning in March 1995, April 1995, and May 1995 (Cellnet Exs. 116 and 120) in support of his contention that the respondent continued to charge its end users different roaming rates from those charged to Cellnet (Tr. IV, 171-175).[25] Mr. Tricarichi also opined that the respondents' wholesale entities were not charging their related retail arms for roaming services (*Id.* at 180). Finally, with respect to roaming, Mr. Tricarichi refuted any claims that, in 1995, Cellnet had requested to not be subject to banded roaming (Tr. XIII, 210, 211).[26] Pursuant to Cellnet Exhibit 114, Cellnet believed that it had the option of purchasing any of AirTouch Cellular's retail

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[25] For 1999, Mr. Tricarichi alleges that AirTouch Cellular continues to discount roaming for its end-user customers (Tr. IV, 185). AirTouch Cellular Exhibits 6 and 7 quantifies (in the form of credits taken by Cellnet on AirTouch Cellular invoices) some of the alleged disparity (Tr. V, 64, 69, 70, 71).

[26] Banded roaming is the method of pricing cellular roaming through the establishment of four defined bands for a given home market. Prices are increasingly higher as someone moves away from their home service area (Tr. X, 71).

or mass market promotions for which it qualified (*Id.* at 213). As a result, in 1996, Cellnet expressed an interest in receiving roaming service in accordance with the terms and conditions depicted in Cellnet Exhibit 175. This request was ultimately denied (*Id.* at 213).

Testimony was offered with respect to nonrate-related benefits allegedly provided to AirTouch Cellular's retail arm at no charge, while Cellnet was either unable to obtain these services or was required to purchase these benefits. Specifically, Mr. Tricarichi stated that, while Cellnet has been able to purchase access to "Star" numbers since January 1996, which allow end users to contact service providers free of charge, AirTouch Cellular's wholesale arm provides this service at no cost to its retail affiliate (Tr. IV, 192; Cellnet Ex. 124). The witness also discussed AirTouch Cellular's practice, beginning in July 1994, of charging Cellnet for routing calls to another carriers' voice mail service but not assessing the routing charges if Cellnet utilized AirTouch Cellular's voice mail service (Tr. IV, 196). Related to the issue of voice mail, Mr. Tricarichi provided that AirTouch Cellular refused to allow Cellnet to connect to AirTouch Cellular's switch for the purpose of self-provisioning voice mail (*Id.* at 209).

Mr. Tricarichi presented evidence regarding AirTouch Cellular's practice of charging Cellnet toll charges for calls that are completed within the AirTouch Cellular markets but cross Local Access Transport Area (LATA) boundaries. He did not believe that AirTouch Cellular's retail affiliate is similarly being assessed these charges (*Id.* at 205).

Relative to access to an activation port for the purpose of adding new customers to the AirTouch Cellular system, Mr. Tricarichi indicated that, unlike AirTouch Cellular's retail affiliate, Cellnet had no ability to access this port in order to directly activate accounts prior to 1994 (*Id.* at 206).

Cellnet discussed its 1996 inquiries regarding a switch-to-switch connection with AirTouch Cellular for the purpose of allowing Cellnet to directly communicate with AirTouch Cellular regarding billing information and the provision of prepaid cellular service (*Id.* at 212-217).

Evidence was presented regarding a number of AirTouch Cellular retail service offerings and associated rates, offered from 1992 through 1998, that Cellnet alleged were more favorable than it was receiving from AirTouch Cellular's wholesale arm (*Id.* at 223, 231, 236, and 298-302; Tr. V, 11, 12, 18, 21-26, 36). These offerings included digital service, lower per minute rates, lower recurring monthly rates, free minutes of use, flat-rate services, or equipment that were offered by AirTouch Cellular's retail affiliate via either customer-specific contracts or general promotions, but were not available to Cellnet. Based on these scenarios, Cellnet asserted that it is not offered service under the same terms and conditions as AirTouch Cellular's retail entity (Tr. IV, 239). As a result, Cellnet was unable to compete against AirTouch Cellular for the relevant retail contracts (*Id.* at 223, 239).[27]

While Cellnet acknowledged that, beginning in November 1996, it may have had the opportunity to resell retail plans, this was not practicable due to specific restrictions placed on resellers. These included the inability to receive billing tapes (*Id.* at 227, 228, 229; Cellnet Exs. 114, 132). While Cellnet recognized that there were occasions when it was able to resell cellular services under similar terms and conditions as offered by AirTouch Cellular's retail entity, it was impossible for Cellnet to compete due to the overhead which must be included in addition to the cost of service (Tr. V, 30).

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[27] Cellnet considered the rates contained in Cellnet Exhibit 114 for the purpose of reaching this conclusion.

From January until May 10, 1995,[28] Cellnet was billed under the Reseller Advantage III rate plan contained in Cellnet Exhibit 110. Beginning on May 10, 1995, the Reseller Advantage III rate plan was modified, as reflected in Cellnet Exhibit 120, to signify a change in the roaming rate tiers. With respect to pricing methodology, Cellnet represented that, while it was billed pursuant to a nonretroactive manner, AirTouch Cellular's retail affiliate was billed at the highest pricing tier for all of its minutes (Tr. IV, 249). This difference in pricing methodology resulted in a difference of approximately $ .065/minute between the Cellnet and AirTouch Cellular rate in the Cleveland market (*Id.* at 251).

From January until November 1996, Cellnet was operating under the rates contained in Cellnet Exhibit 120 (Reseller Advantage III) until the rates contained in Cellnet Exhibit 114 became effective (*Id.* at 180, 181, 252).

Cellnet's analog rates for specific markets as of the time of the hearing are contained in Cellnet Exhibit 151 (Cleveland/Akron/Canton/Lorain-Elyria/Ohio RSA # 3), Exhibit 152 (Mansfield/Ohio RSA # 5, Ohio RSA # 6), Exhibit 153 (Columbus/Ohio RSA # 4 and # 8), and Exhibit 154 (Cincinnati/Dayton/Hamilton-Middletown/Springfield/Ohio RSA # 4 and # 8) (Tr. IV. 281). Cellnet's digital rates as of the time of the hearing are contained in Cellnet Exhibit 157 (*Id.* at 283). Cellnet alleges that digital cellular service was available to AirTouch Cellular end users as of November 24, 1997, at service packages and rates which were more favorable than that offered to Cellnet at the wholesale level (*Id.* at 290-293). Cellnet did not receive a comparable package for digital service until March 19, 1998 (*Id.* at 294; Cellnet Ex. 157).

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[28] Cellnet also discussed the rates it was charged in 1992 (Tr. V, 13; Cellnet Ex. 142).

On cross-examination, Mr. Tricarichi acknowledged that in its advertising for 1993, 1994, 1995, 1996, and 1997 Cellnet represented that its local airtime rates were typically lower than AirTouch Cellular's retail rates (Tr. V, 43, 44, 52, 53). He also acknowledged that, while it continues to receive service, Cellnet has not had a contract with AirTouch Cellular since the detariffing of cellular service occurred in 1993 pursuant to the Commission's 89-563 Order (*Id.* at 78).

Finally, Mr. Tricarichi defined a subscriber as a customer who activates service on AirTouch Cellular's wholesale network regardless of whether it is as a resale customer or a retail customer. The basis for this definition stemmed from Mr. Tricarichi's involvement as an employee of AirTouch Cellular from 1988-1989 (Tr. XIII, 216). Cellnet's billing cycle with AirTouch Cellular commences on the 10th of each month. Mr. Tricarichi explained that Cellnet is billed for every end user that has a number. If a Cellnet customer activates service in the middle of the billing cycle, Cellnet is charged a prorated charge for the first month, as well as a full month's access charges in advance. In the event that a Cellnet customer discontinues service in the middle of AirTouch Cellular's billing cycle to Cellnet. Cellnet does not receive a prorated credit for the remaining portion of the billing cycle (*Id.* at 216).

2. Robert Ferguson

Mr. Ferguson, an accountant employed in the practice of forensic and investigative accounting, was called as an expert witness for Cellnet. Based on information provided by AirTouch Cellular, Mr. Ferguson was asked, by Cellnet, to comment on the various rates purported to have been charged by AirTouch Cellular's wholesale operation to its retail operations from 1991 to 1997 in those markets where Cellnet competed with AirTouch Cellular's retail operation. Mr. Ferguson was also asked to comment on AirTouch Cellular's

allocation of expenses between its wholesale and retail operations.

Specifically, Mr. Ferguson found AirTouch Cellular's accounting (DPLMRS Reports) to be incorrect due to omissions related to AirTouch Cellular's wholesale income and retail expenses (Cellnet Ex. 186, at 2-3). In addition, Mr. Ferguson concluded that the allocation of certain expenses did not appear reasonable. Rather than the straight proportional allocation of all indirect expenses utilized by AirTouch Cellular, Mr. Ferguson testified that expense allocations should be analyzed by considering the nature of the expenses involved and the benefit received by the activity for which the costs were allocated (*Id.* at 8, 9).

For most of the years 1991-1997, Mr. Ferguson concluded the following: (1) wholesale revenue excluded all charges to AirTouch Cellular's retail affiliate (airtime, roaming, and toll) for interstate calls, (2) wholesale revenue excluded free airtime and all charges to AirTouch Cellular's retail affiliate for intrastate roaming and toll, (3) AirTouch Cellular's wholesale revenue was understated since access charges were based on the number of directories rather than the average number of subscribers, (4) forwarding/transfer minutes were not charged by AirTouch Cellular's wholesale affiliate to its retail affiliate from September 1994 to December 1994, even though Cellnet was billed for these features when the features were used by a Cellnet end-user customer, (5) directory assistance was not charged by AirTouch Cellular's wholesale affiliate to its retail affiliate from 1991-1995, (6) the indicated and effective rates[29] (peak airtime, off-peak airtime, and access charges) charged to

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[29] The indicated rate is the rate that AirTouch Cellular purports to charge itself. The effective rate is calculated by taking the dollars that appear on the wholesale tax spreadsheets and dividing them by the AirTouch Cellular's retail minutes of use (Tr. V, 143).

AirTouch Cellular's retail affiliate from 1991-1997 are lower than the rates provided to Cellnet, (7) unlike resellers, AirTouch Cellular's retail affiliate was not charged for reserving unused telephone numbers, and (8) detailed billing records between AirTouch Cellular's wholesale and retail affiliates were not comparable to the bills issued to Cellnet as an nonaffiliated reseller (*Id.* at 4, 10, 13, 14, 17, 20).

Mr. Ferguson restated the DPLMRS reports in order to rectify some of the alleged inadequacies elaborated above with respect to the calculation of AirTouch Cellular's wholesale and retail revenue (*Id.* at 9). Mr. Ferguson acknowledged that his restatement of the DPLMRS reports only addressed the revenue side and did not restate any expenses. This restatement results in an increase of the wholesale income and a decrease in retail income for the respective years 1991-1997 (*Id.*).

AirTouch Cellular claimed that the resulting differences alleged by Mr. Ferguson would not be as significant if Cellnet had used the data contained in AirTouch Cellular's restated DPLMRS reports for 1995 and 1996 (Tr. V, 123). Although Mr. Ferguson admitted that he was aware that AirTouch Cellular had already restated the DPLMRS reports for 1995 and 1996, he continued to use the original DPLMRS reports for these years when developing his testimony (*Id.* at 94). Mr. Ferguson explained that he relied on the original DPLMRS documents since they were completed contemporaneous to the time periods currently in dispute (*Id.* at 139). In addition, Mr. Ferguson explained that he was limited in his ability to consider the restatements due to the late date in which he received them (*Id.* at 141). Regardless of the data utilized (the original or restated), Mr. Ferguson indicated that his comparison of the indicated rate to the Cellnet rate would not change (*Id.* at 146, 148).

Upon a side-by-side comparison of AirTouch Cellular's DPLMRS reports and his restatement, Mr. Ferguson identified the following areas in which significant differences existed: (1) the manner in which their post paid access charge was calculated (average number of subscribers versus the number of directories),[30] (2) the manner in which revenues associated with "caller pays" airtime was calculated, (3) manner in which revenues associated with peak airtime was calculated, (4) the manner in which "cost of sales" is calculated, and (5) the manner in which cost of foreign roaming is calculated (*Id.* at 100-112).

3. Terry Tindel

As of the time of the hearing, Mr. Tindel was the executive vice president and general manger of the eastern region[31] for AirTouch Cellular since August 1996. His responsibilities include all operational aspects for both AirTouch Cellular's wholesale and retail operations within the eastern region states (Tr. VIII, 7). Mr. Tindel stated that the number of AirTouch Cellular resellers and the number of reseller lines have increased over the last two or three years (*Id.* at 8).[32] Mr. Tindel

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[30] The number of directories represents the number of active cellular numbers that are included in all billing cycles for a given month (Tr. XIII, 124-175). The number of directories is derived from both the billing cycle report, as well as the activation by state report (which is used for the purpose of calculating the percentage of Ohio subscribers in a specific market (i.e., Cleveland). Therefore, the numbers used for directories to calculate access charges are only as accurate as the number of subscribers are accurate (Tr. XIII, 66, 69, 150, 152, 154, 155). In a multi-line account, each line should count as a directory (Tr. XIII, 158).

[31] The Eastern Region includes Michigan, Ohio, Kentucky, Indiana, and Georgia (Tr. VIII, 6).

[32] Mr. Tindel indicated that in Ohio the number of resellers has grown from two in 1993 to 13 in January 1999. In Ohio, customers of resellers account for approximately ten percent of the end users on the AirTouch Cellular

described AirTouch Cellular's efforts to assist resellers, including the existence of distribution channel managers who serve as responsive contacts for resellers (*Id.* at 8).

Mr. Tindel testified that since August 1996, wholesale rates to resellers have been reduced to allow resellers to remain competitive in the retail market (*Id.* at 8). In determining reseller rates, AirTouch Cellular looks at the margin between retail and wholesale rates, customer value,[33] and the need for growth in the reseller channel (*Id.* at 27, 48). Mr. Tindel acknowledged that AirTouch Cellular prefers resellers which agree to be exclusive resellers (*Id.* at 56). Pursuant to a January 1997 memo, Mr. Tindel recognized that the level of support offered to resellers was dependent on whether a reseller was exclusive to AirTouch Cellular (*Id.* at 56; Cellnet Ex. 211).

Mr. Tindel acknowledged that, for its retail operations, AirTouch Cellular does offer concessions for competitive reasons (Tr. VIII, at 19). He discussed AirTouch Cellular's guidelines and reporting relative to the use of concessions (*Id.*). In general, Mr. Tindel believes that retail concessions run between 1 to 2 percent of total sales (*Id.* at 20).

Retail and reseller pricing for AirTouch Cellular is determined by its marketing department in conjunction with the sales department, with final approval by Mr. Tindel (*Id.* at 24, 25). Mr. Tindel acknowledged that, at least as of November 1997, he was unaware of the 89-563 requirements with respect to resale (*Id.* at 29, 30). Mr. Tindel also acknowledged that, while AirTouch Cellular retail offered free weekends

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system. Mr. Tindel stated that he was not aware how many providers are exclusive resellers of AirTouch or how may resellers actually inquired about becoming a reseller (Tr. V, 14, 17; Cellnet Ex. 212).

[33] This value is determined by comparing the up-front costs to acquire and maintain the customer to the revenue expected to be received from the customer (Tr. VIII, 60).

promotions prior to November 1997, the promotion was not extended to resellers pursuant to AirTouch Cellular's wholesale plans (*Id.* at 31, 49).

With respect to AirTouch Cellular's digital cellular services, Mr. Tindel testified that the retail offering was available in late October or early November 1997; however, AirTouch Cellular did not offer a discounted wholesale rate to Ohio resellers until after February 1998 (*Id.* at 33). Mr. Tindel explained that the delay was necessary in order to allow time for AirTouch Cellular to determine the appropriate level of wholesale discounting (*Id.* at 50).

4. Diane Koskey

From 1991 until mid-1994, Ms. Koskey served as senior financial analyst in AirTouch Cellular's financial planning and analysis department. From May 1994 to November 1998, Ms. Koskey worked in AirTouch Cellular's marketing department as a pricing analyst and eventually as a manager. In these capacities, she was responsible for evaluating market trends and determining retail and reseller prices. The development of pricing included the following components: (1) monthly access, (2) a fixed number of minutes included each month in a plan, (3) airtime per minute rates, (4) roamer prices, and (5) feature availability. AirTouch Cellular attempts to combine these factors in various rate plans in order to appeal to targeted customer segments (Tr. X, 30-35).

Ms. Koskey explained that, while retail rate plans geared to high volume users are tiered, this is not necessarily the case for all rate plans. In any given market, the number of rate plans available to new retail customers is less than one hundred. AirTouch Cellular introduces rate plans first based upon competitive environment factors and, second, upon an analysis

of profitability (*Id.* at 35, 36).[34] As a pricing analyst from 1994-1996, Ms. Kosky analyzed competitive market trends and ultimately recommended retail rates for AirTouch Cellular in Ohio. These recommendations were ultimately provided to Mr. Terry Tindel, who made the final decisions regarding pricing (*Id.* at 87, 88). For the time frame 1994 through November 1996, each time a retail rate or promotion was introduced, AirTouch Cellular evaluated how the new retail rate would compare to a reseller rate plan. AirTouch Cellular aspired to maintain a resale rate that was lower than the corresponding retail rate. Reseller credits were issued if the retail promotion caused the net retail price to fall below the net reseller price (*Id.* at 40, 59, 60).[35] Beginning in late 1996, AirTouch Cellular began to allow resellers to purchase service under the same terms and conditions as a retail customer, including equipment (*Id.* at 41, 60, 64).

Ms. Koskey attempted to perform an comparison of airtime and access costs which an AirTouch Cellular retail customer and a reseller would pay for specific user usage patterns for the years 1994, 1996, 1998. Through the illustration depicted in its exhibits 14 and 15, AirTouch Cellular attempted to demonstrate that for 1994, 1996, and 1998, the applicable reseller costs were lower than the charges for a comparable AirTouch Cellular retail customer (*Id.* at 53, 55-58, 112, 113).[36]

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[34] The profitability analysis focused on the costs associated with acquiring and maintaining the customer, such as the technical costs of using the network, direct marketing expenses, and direct selling expenses (Tr. X, 39).

[35] When performing this comparison, equipment was not included inasmuch as AirTouch Cellular contended that, similar to AirTouch, resellers could purchase equipment from independent suppliers (*Id.* at 65, 93).

[36] This comparison was limited to access and airtime charges and did not include other items such as equipment, concessions, and promotions (Tr. X, 114, 115).

Ms. Koskey testified that AirTouch Cellular began to offer digital cellular service to retail customers in Ohio commencing in late November 1997. Digital service was offered to AirTouch Cellular resellers beginning in March 1998. This additional time was needed in order to properly determine the proper level of resale discount for digital service (*Id.* at 67). The digital retail promotional rate offered to AirTouch Cellular's retail customers from November 1997 to March 1998 was less than the analog reseller rates offered for that time frame (*Id.* at 99, 100, 108). AirTouch Cellular did not allow for the pooling of analog and digital minutes for the purpose of reseller's satisfying price tier requirements (*Id.* at 70).

Ms. Koskey discussed the concept of banded roaming that was introduced in the spring of 1995. Under this concept there are four defined bands of roaming. The roaming charges increase as a subscriber is further away from their home service area (*Id.* at 71). Ms. Koskey admitted that the banded roaming rate reflected in Cellnet Exhibit 120 does not reflect the rate that was assessed to AirTouch Cellular's retail affiliate. In fact, Ms. Koskey acknowledged that she was not familiar with the wholesale/retail paradigm as previously established by the Commission (*Id.* at 82, 83). As a result of the banded roaming rate structure, Cellnet's roaming costs remained about the same, while AirTouch Cellular Cellular's retail end user's roaming charges decreased (*Id.* at 84, 85).

As a senior financial analyst, some of Ms. Koskey's work responsibilities involved the budgeting of expenditures for AirTouch Cellular. Ms. Koskey acknowledged that AirTouch Cellular never distinguished between expenditures involving its wholesale and retail operations. Ms. Koskey also recognized that she was not personally aware of any separations, including budgetary, between AirTouch Cellular's wholesale and retail operations (*Id.* at 86, 97). Finally, Ms. Koskey acknowledged that, when setting wholesale rates for resellers, she was

unaware of the rate that AirTouch Cellular charged its retail affiliate for airtime (*Id.* at 86, 92).

5. Michael L. Yoder

As of the time of his testimony, Mr. Yoder served as the Director of Pricing, Planning, and Analysis for AirTouch Cellular. Prior to entering this position, Mr. Yoder was Manager of Pricing and Promotions from October 1994 to November 1995. In this position, Mr. Yoder was involved in the creation of pricing plans for resellers in the state of Ohio (*Id.* at 122).

Mr. Yoder confirmed that, from 1994-1996, reseller rate plans were primarily based upon retail rates provided to retail end users. After 1996, resellers were essentially allowed to buy any retail end user plan that was available (*Id.* at 123). Similar to Ms. Koskey, who reported to him, Mr. Yoder stated that he was not familiar with the distinction between AirTouch Cellular's wholesale and retail operations with respect to the provisioning of service (*Id.* at 124).

6. David A. Shanks

Mr. Shanks began his employment with AirTouch Cellular in 1988. As of the time of his testimony Mr. Shanks served as the tax manager for the respondent. He indicated that he has worked in the preparation of AirTouch Cellular's wholesale/retail income statements since 1990 or 1991 (Tr. VII, 8, 26). He testified that in 1994 AirTouch Cellular inadvertently failed to record $ 19 million in wholesale revenue attributable to the Cincinnati market.[37] This error was not discovered until late in 1998 as a result of AirTouch Cellular's preparation for

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[37] Although AirTouch Cellular's revenue group prepared the wholesale revenue calculations for each market, Mr. Shanks neglected to include the Cincinnati market numbers when completing the Commission annual report and the related income statement (Tr. VII, 31).

the hearing in this matter (*Id.* at 10). By now including the Cincinnati wholesale revenue for 1994, AirTouch Cellular's wholesale revenue reporting, as well as the allocation of company expenses to its wholesale operations, would both need to be increased. As a result, Mr. Shanks agreed that the associated net retail income for 1994 would go down by some amount, although not to the full extent of the $ 19 million.

7. Patrick J. Bennett

Mr. Bennett began serving as controller of AirTouch Cellular in late 1996. Mr. Bennett explained that, in preparing its financial reports, AirTouch Cellular first prepares its revenue number for the past year on a market basis. This information is utilized for the preparation of the annual report to be filed with the Commission. Subsequent to completing the revenue calculations, AirTouch Cellular calculates its expense figures. Finally, the revenue and expense information is consolidated in order to produce a DPLMRS report (Tr. VI, 17).

In 1998, AirTouch Cellular became aware that some of its affiliated retail free minutes may not have been accounted for beginning in 1996.[38] Mr. Bennett attributed this inaccuracy due to a billing system change. In addition, there was a concern that the revenue generated from nonaffiliated reseller usage was not properly identified as wholesale revenue in the original DPLMRS (*Id.* at 30-32). There was also the concern that prior to 1998, for the purpose of calculating wholesale revenue, AirTouch Cellular improperly limited its focus to revenue related to calls which both originated and terminated in Ohio (*Id.* at 23, 24).

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[38] Free minutes include allowance minutes, which are already included in a plan, promotional minutes, and concession minutes (*Id.* at 37).

As a result of these concerns, AirTouch Cellular prepared restatements of 1995-1997 data (*Id.* at 18). Mr. Bennett explained that, unlike the original reports, the restatements included the corresponding minutes and revenues that either originated and/or terminated in Ohio as a result of calls placed by AirTouch Cellular's retail customers or customers of resellers of AirTouch Cellular's network (*Id.* at 61, 62, 68, 71-73).[39] The restatements accounted for all minutes carried on AirTouch Cellular's network, including free and promotional minutes (*Id.* at 85, 139). The restatements also reclassified foreign roaming as a wholesale revenue (*Id.* at 86, 119, 139).

With respect to expenses, Mr. Bennett explained that the distinction between direct and allocated expenses. Direct expenses are charged entirely to the wholesale or retail side of the business. Allocated expenses are applied based on the applicable percentage between wholesale and retail relative to total Ohio revenue (*Id.* at 92, 137, 138). Mr. Bennett agreed that expense allocation can be significantly impacted simply by increasing retail rates (*Id.* at 102). Cellnet Exhibit 195 depicts the aggregate general ledger expenses for each AirTouch Cellular department as a whole for 1992-1997. The actual percentage allocations between wholesale and retail were instituted at a later date similar to that depicted on Cellnet Exhibit 194 (*Id.* at 123, 124). Mr. Bennett stated that discounts for dropped calls should be allocated between retail and wholesale due to the fact that they relate to the performance of the network (*Id.* at 126). In regard to free phones, Mr. Bennett opined that this expense could be allocated between wholesale and retail if the reason for the issuance of the free phone was in lieu of a credit for poor quality service; but, Mr. Bennett was unaware of a free phone ever being issued to a reseller as a concession (*Id.* at 127-128).

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[39] Restatements were not performed for years prior to 1993 (*Id.* at 73).

Mr. Bennett testified that the restated DPLMRS indicated a 8 percent increase in the wholesale revenue calculation for 1995 (*Id.* at 45). On cross-examination, Mr. Bennett indicated that, based on the restatement for 1996, there was a 10 percent increase in the wholesale minutes compared to the original stated minutes of use (*Id.* at 112; Cellnet Ex. 196). The restatement of 1997 wholesale minutes and revenues reflected a 30 percent increase in wholesale minutes and a 27 percent difference in wholesale revenues (Tr. VI, 55; Cellnet Exs. 191-193).

8. DalAnn Martin

In 1992, Ms. Martin served as a staff two accountant in AirTouch's revenue group. In 1993, she was promoted to senior revenue accountant and was responsible for all of Ohio revenues. In 1995, she was promoted to supervisor of revenue where she was responsible for revenue accounting and revenue assurance. At the time of her testimony, she was a revenue manager with similar areas of responsibility (Tr. VII, 62).

Using the information contained in Cellnet Exhibit 103, Ms. Martin attempted to calculate an average wholesale rate charged by AirTouch Cellular's wholesale operations to its retail operations for 1994 and 1995. The average calculated rate for all of 1994 was $ .24/minute (*Id.* at 72-74). The actual tiered nonretroactive rates for the 1994 time frame are listed on Cellnet Exhibit 208, AT-0002579.

According to Cellnet Exhibit 103, AT-0002136, AirTouch Cellular applied the rate plan in Cellnet Exhibit 208 on a retroactive basis for its affiliated wholesale charges in 1995. AirTouch Cellular viewed itself as one large customer and placed itself at the lowest tier. As a result, all of its lines received the lowest rate. In hindsight, Ms. Martin acknowledged that this action was incorrect (*Id.* at 76).

Ms. Martin testified regarding the appropriateness of utilizing the number of directories, in lieu of the average number of subscribers, for the purpose of performing the wholesale tax calculation (Tr. XIII, 8; AirTouch Cellular Ex. 21, 4, 5).[40] Even customers with no usage and no monthly access fee would still receive a bill reflecting a zero charge. The average number of subscribers is based on state activation reporting which is done for marketing purposes on a calendar month basis. It is calculated by taking the beginning number of subscribers plus the ending number of subscribers for a given month and dividing by two (Tr. XIII, 42, 46, 55, 88).

Ms. Martin believes that the number of directories is the more appropriate measurement for the wholesale tax calculation inasmuch as it correlates to billing cycle reports, whereas the average number of subscribers has never been audited, but rather is simply based on a number that has been carried forward from one month to the next since 1993 in the absence of an audit (*Id.* at 34, 102, 115, 129; AirTouch Cellular Ex. 21, 4, 5).[41] In support of her belief, Ms. Martin noted that the average number of subscribers did not reconcile with the number of directories. Due to the fact that the number of directories corresponded to the billing cycle report, she found this measurement to be more reliable (Tr. XIII, 42). In addition, Ms. Martin avers that the utilization of directories is consistent with the standard industry practice for revenue accounting for the billing of access charges (*Id.* at 102, 115).

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[40] The wholesale tax calculation is synonymous with the Commission's annual assessment (AirTouch Ex. 21, 1).

[41] Ms. Martin acknowledged that the average number of subscribers, and not directories, was utilized for the wholesale tax reporting in 1994, in the Cleveland, Akron, and Canton markets (*Id.* at 76). She was unsure as to the measurement relied upon for 1991 and 1992 (*Id.* at 57).

Ms. Martin testified regarding the appropriateness of "calling party pays" being considered a wholesale or retail service in either Ameritech or Cincinnati Bell Telephone's territory. Ms. Martin agreed that the provision of "calling party pays" became a wholesale function in 1997,[42] once AirTouch Cellular began offering "calling party pays" service in Ameritech Ohio's service territory (*Id.* at 164, 166, 167, 170, 173). Ameritech Ohio required the technical interaction between AirTouch Cellular's wholesale operations and itself in order to identify the cellular phone as a "calling party pays" participant (*Id.* at 162, 164).

9. Seamus Hyland

Mr. Hyland is the Cleveland regional director for AirTouch Cellular and is responsible for retail and direct sales.[43] Mr. Hyland generally explained the components of AirTouch Cellular's retail plans and promotions (Tr. VIII, 67, 68). Mr. Hyland enumerated the following AirTouch Cellular regions in Ohio: (1) Cleveland, (2) Akron-Canton-Toledo-Lima, (3) Columbus, and (4) Cincinnati-Dayton. Mr. Hyland testified that AirTouch Cellular empowers its customer service representatives to deviate from its existing retail rate plans and promotions in the form of concessions for the purpose of gaining or retaining a customer (*Id.* at 72, 73). Material concessions must be approved by a manager (*Id.* at 86, 114). Retention concessions are offered pursuant to the company's written guidelines (*Id.* at 75).[44] While there are no written

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[42] This also corresponds to the time frame that "calling party pays" was offered to resellers (*Id.* at 169, 174).

[43] Direct sales includes all of the sales and service centers, as well as the business account representatives (outside sales) (Tr. VIII, 65).

[44] The guidelines existed as of the first or second quarter of 1998. From approximately 1995 to the first or second quarter of 1998 there was a general unwritten policy regarding concessions (*Id.* at 82). Prior to that time frame

guidelines for new sales concessions or for the application of government rate plans, there are unwritten guidelines that are communicated to employees (*Id.* at 85, 96, 100). Finally, when making concessions, AirTouch Cellular's retail employees are unaware of the related wholesale cost (*Id.* at 107).

In regard to the equipment rental program, Mr. Hyland admitted that, at least in 1995, the rental program did not recoup its cost in a reasonable period of time (2-3 years) and was, therefore, generally operating at a loss (*Id.* at 106).

10. Bernardo Fernandez, Jr.[45]

As part of his business of performing cellular audits, Mr. Fernandez has negotiated deals with AirTouch Cellular on behalf of new and existing AirTouch Cellular retail customers (Tr. XII, 7, 67). Cellnet Exhibits 220, 221, 222, 223, 224, 225, 226, 227 (Exhibits 220, 221, 222, and 223 relates to the January-April 1997 time frame) contain various examples of alleged AirTouch Cellular retail contracts which were renegotiated by Mr. Fernandez on behalf of his clients even though the agreements had not yet expired (*Id.* at 19). He represented that, as a result of the renegotiated contracts, his clients received credits which were tantamount to a rate decrease (*Id.* at 11-13). These rate reductions should have been limited to subscribers eligible for associations or government plans (*Id.* at 14).[46]

(early 1990s to 1993), AirTouch Cellular had a concession matrix based on customer billables and tenure (*Id.* at 83).

[45] Mr. Fernandez also testified in the Ameritech Mobile portion of the proceeding. His prior testimony is summarized above.

[46] Mr. Fernandez acknowledged that in May 1997, he was informed that the terms of the contracts he had previously negotiated could not be applied to future contracts due to errors that had been made by the AirTouch Cellular representative (Tr. XII, 59, 60). Notwithstanding this notice, Mr. Fernandez continued to receive free minute credits and association and government

For example, pursuant to Cellnet Exhibit 224 (February 1998 time frame), Mr. Fernandez represented that he was able to reduce the term of the contract, obtain specified monthly credits, receive additional free minutes and equipment upgrades, and obtain a waiver of certain charges (*Id.* at 26-28). Mr. Fernandez stated that Cellnet Exhibit 225 represents the application of a holiday promotion for an existing customer even though it was supposed to be limited to new activations (*Id.* at 30, 31).

11. Thomas C. Minardo

As of the time of his testimony in this proceeding Mr. Minardo served as regional director for AirTouch Cellular responsible for indirect sales channels across Ohio. He has held this position since the 1994-1995 time frame. The indirect channels include nonaffiliated retailers, agents, and resellers (Tr. XII, 73). In 1995, AirTouch Cellular had four resellers and in January 1999 it had thirteen resellers. Cellnet is the only reseller that does not have a contract with AirTouch Cellular or comply with the requisite security deposit policies (*Id.* at 76, 77). From 1995 to January 1999, 87 entities inquired regarding becoming AirTouch Cellular resellers (*Id.* at 119; Cellnet Ex. 234).[47] Mr. Minardo agreed that at least as of March 1997, Cellnet was AirTouch Cellular's largest customer on either a wholesale or retail basis (Tr. XII, 122). Although Cellnet does not have a contract, AirTouch Cellular provides Cellnet service as though it is under the terms of the standard reseller contract (*Id.* at 135, 136).

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rates for nonaffiliated individuals (*Id.* at 64, 65). He represented that this trend continued until he began to assist Mr. Tricarichi in this complaint case (*Id.* at 48-54, 66).

[47] Some of the 87 may have related to Michigan (Tr. XII, 120).

Mr. Minardo testified that promotional credits are issued to resellers if the retail rate is getting too close to the wholesale rate (*Id.* at 78). Cellnet Exhibit 18 reflects that such credits were offered in 1995-1999 (*Id.* at 80, 88). Mr. Minardo acknowledged that the promotional credits offered are not equivalent to the corresponding retail discount and that not every retail promotion had a corresponding wholesale equivalent (*Id.* at 87, 96, 102). The promotional credits did not include equipment and did not necessarily coincide with the time frames for the retail promotional benefits (*Id.* at 88, 91).

Mr. Minardo represented that he did not know that there was a wholesale and retail side of AirTouch Cellular. Therefore, he was unaware of the rate at which the service is provided to AirTouch Cellular's retail arm (*Id.* at 104, 106).

While Mr. Minardo indicated that retail services could be resold, he acknowledged that some service applications utilized in 1993, 1996, and 1997 contained language restricting such resale (*Id.* at 83, 110-112). The witness provided a comparison of a wholesale and retail plan which were in effect for the Columbus market as of November 21, 1996 (Cellnet Exs. 235, 236). Mr. Minardo concluded that the wholesale and retail plans were identical in nature with the exception of the roaming rates (Tr. XII, 126, 130).

12. Jack E. Roettenberger

As of the time of his testimony, Mr. Roettenberger served in the capacity of vice president of AirTouch's Michigan sales. From February 1990 until September 1993, Mr. Roettenberger held a number of positions in Ohio, including account executive, sales manager, and center manger for the Cincinnati and Dayton markets. From September 1996 to September 1997, Mr. Roettenberger held the position of vice president of sales for the central region which included Cleveland, Akron, Canton, Mansfield, Toledo, Lima, and Findlay (Tr. X, 7, 8).

Mr. Roettenberger testified that during the 1996-1997 time frame, there were three major resellers in the northern Ohio market, including Cellnet, Ameritech Mobile, and one other provider. During 1996-1997, Cellnet was the largest reseller in Ohio (*Id.* at 9-11). He also recognized that AirTouch Cellular did provide concessions to retail customers such as those reflected in Cellnet Exhibit 166. He characterized the concessions reflected in Cellnet Exhibit 166 as being an error. Concessions are supposed to be reviewed by managers prior to being approved. Mr. Roettenberger stated that, while there is no written AirTouch Cellular company policy or training regarding concessions, it is discussed in meetings and budget reviews (*Id.* at 12, 13, 15, 18, 26). The direct sales force has the authority to give away minimal concessions absent any managerial review. All other concessions are supposedly reviewed by upper management prior to being given to the customer (*Id.* at 26-28).

The witness enumerated a number of factors that are analyzed for the purpose of concessions. Primary to this analysis was the determination of the time period for recovering its customer acquisition cost. Mr. Roettenber acknowledged that, since AirTouch Cellular's retail affiliate does not purchase service from its wholesale arm, this purchase price is not included within the concession analysis (*Id.* at 19, 20, 22, 23). He did clarify that, while AirTouch Cellular does not analyze the cost of service at the retail level, a director or vice president would review concessions that fall within some unspecified parameters to determine their effect relative to the cost to actually produce the service and to compare AirTouch Cellular's retail end-user price resulting from the concession to the price charged to resellers (*Id.* at 22-25, 27).

With respect to AirTouch Cellular's desire to promote the expansion of its resale business in the 1996-1997 time period, Mr. Roettenberger attempted to provide context to Cellnet Exhibit 210. He explained that resellers were beneficial for the

purpose of filling either a customer segment or geographic segment not currently being met by AirTouch Cellular's retail operations (*Id.* at 17). Mr. Roettenberger stated that, while it would prefer resellers to be exclusive, AirTouch Cellular would not turn away a nonexclusive reseller (*Id.* at 17).

13. Douglas Edward VanScoy

As of the time of his testimony, Mr. VanScoy served as an applications manager one with AirTouch Cellular. In this capacity, he is manager of the group responsible for the AirTouch Cellular billing system. He has also served as a lead systems analyst and systems analyst for AirTouch Cellular. As a systems analyst in October 1994, he held responsibilities related to AirTouch Cellular's billing system (Tr. IX, 18, 19). The billing system is responsible for generating the actual bills that are issued to customers, as well as information that goes to associated areas, such as the general ledger, reseller tapes, and major accounts billing exchange logistical records (MABEL) tapes.[48]

Mr. VanScoy described the OMNI billing system, which includes the call message processing system. The system serves as a large database that stores every call that is made by customers that AirTouch Cellular supports (including resellers). The system determines the rate plan for each call and the applicable charge per call. Call data is maintained in four separate files for the purpose of distinguishing retail and wholesale, as well as home and roaming charges. This process occurs for the 14 billing cycles in Ohio during a 30-day period (*Id.* at 20, 21). Pursuant to the billing system described by Mr. VanScoy, resellers receive a billing tape with the specific

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[48] MABEL tapes are an industry standard utilized for the exchange of cellular information. In addition to call records, it contains information at an account level, including taxes, other charges and credits, feature charges, and equipment charges (*Id.* at 18, 23).

information regarding the call activity for the billing period. This would include information such as the end user's telephone number, the origination and destination of the call, the duration of a call, and whether any special services, such as voice mail or directory assistance were provided (*Id.* at 23). The format of the reseller billing tape existed prior to Mr. VanScoy's employment with AirTouch Cellular. Mr. VanScoy indicated that MABEL tapes are available to all customers, including resellers, upon request (*Id.* at 25).

Mr. VanScoy testified that MABEL tapes could be used by resellers to rebill their services (*Id.* at 25). He also stated that, in limited circumstances, it is possible for a reseller to purchase service under a retail plan and still receive a reseller tape (*Id.* at 27, 30). Mr. VanScoy acknowledged that, unlike for its resale customers, AirTouch Cellular's wholesale side does not produce a monthly bill for its retail side (*Id.* at 36).

Mr. VanScoy indicated that AirTouch Cellular's retail employees have the potential ability to access the OMNI billing system for purposes such as customer care, activations, change rate plans, and add promotions (*Id.* at 31). Resellers are offered the ability to access the OMNI billing functionalities similar to the AirTouch Cellular retail employees, although Mr. VanScoy acknowledged that, prior to 1994, resellers could not directly activate the switch (*Id.* at 31). Mr. VanScoy explained that AirTouch Cellular does not provide the real-time billing capability to its own retail operations or to resellers (*Id.* at 32).

14. Penny Burlison

From 1994 to February 1997, Ms. Burlison served in the capacity of a customer care supervisor for AirTouch Cellular's retail operations. In this capacity, she supervised customer care representatives who handled complaints regarding billing and

service (Tr. IX, 39).[49] The number of customer care representatives in the Cleveland market for the time period 1994-1997 ranged from approximately 10-17. Ms. Burlison acknowledged that during her tenure as a customer care supervisor she was never aware of a delineation between AirTouch Cellular's wholesale or retail departments (*Id.* at 41, 42).

With respect to AirTouch Cellular's endeavor to retain its retail customers, Ms. Burlison testified that customer care representatives could provide free features, or a variety of credits (service or equipment related) to AirTouch Cellular's retail customers considering a switch to Cellnet (*Id.* at 43-48, 63, 64). Ms. Burlison testified that, up until 1994, AirTouch Cellular would produce reports based on electronic serial numbers to determine if any of its customers had switched to Cellnet's retail service. This information was used to attempt to regain these customers (*Id.* at 52, 53). In addition, prior to 1994, AirTouch Cellular's customer service representatives could, through its databases, determine the rates which Cellnet was being charged for a specific customer (*Id.* at 54, 55). Further, Ms. Burlison admitted that, in 1993, she personally provided AirTouch Cellular employees in Columbus with information relative to Cellnet's rates. This endeavor was pursued with the intent of protecting AirTouch Cellular's customer base from Cellnet's entry into Columbus (*Id.* at 60-62; Cellnet Ex. 214).

15. David C. Rudinger

Mr. Rudiger, a employee of Cellnet, testified with respect to Cellnet Exhibit 166. He indicated that, pursuant to his negotiations with AirTouch Cellular in October 1997, his wife was offered a monthly rate of $ 23.99/month, including 500 minutes/month, and a telephone (Tr. XI, 72).

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[49] At the time of her testimony on February 8, 1999, she was an AirTouch Cellular retail sales manager.

16. Stephen Nemec

Mr. Nemec, an accountant with Cellnet, testified regarding the average roaming rates/minute charged to Cellnet for the time frame May 1992 to the end of December 1998 (Tr. XI, 75; Cellnet Ex. 219). Mr. Nemec testified that commencing with the December 1998 billing cycle, AirTouch Cellular no longer included digital cellular minutes for the purpose of calculating Cellnet's volume discounts (*Id.* at 79). As a result, Cellnet's peak airtime rates and recurring charges both increased (*Id.* at 80). Mr. Nemec acknowledged that, as reflected in AirTouch Cellular Exhibit 7, Cellnet, on its own, has discounted AirTouch Cellular's roaming charges since August 1996 to reflect the alleged difference between the roaming rates actually charged to Cellnet and the roaming rate that Cellnet believes it should be charged (*Id.* at 84).

IV. PROCEDURAL ARGUMENTS RAISED BY RESPONDENTS

A. Preemption

AirTouch Cellular describes the requested relief in this case as either an attempt to retroactively regulate the rates charged by AirTouch Cellular over the past eight years, as well as to regulate the rates on a going forward basis (AirTouch Initial Br. at 1). AirTouch Cellular submits that, effective August 1994, the Commission authority to regulate the rates charged by cellular service providers was preempted by federal law pursuant to 47 U.S.C. 332(c)(3)(A). AirTouch Cellular contends that this preemption impacted all state authority to regulate rates, including the authority to adjudicate whether the rates charged are unjust, unreasonable, or discriminatory as contemplated by Sections 4905.22, 4905.33, or 4905.35,

Revised Code (*Id.* at 16).[50] As a result, AirTouch Cellular contends that Cellnet's claims must be denied (*Id.* at 2).

Ameritech Mobile contends that, even if Cellnet is successful on some or all of the counts in its complaint, it is restricted as to any applicable remedy due to the provisions of 47 U.S.C. 332(c)(3). While Ameritech Mobile acknowledges that the Sixth Circuit ruled that the Commission could determine its own jurisdiction in this matter, Ameritech Mobile does not believe that decision signified that the Commission would ultimately have jurisdiction regardless of the remedy imposed. Rather, Ameritech Mobile believes that the Sixth Circuit simply provided the Commission with the ability to initially determine its own jurisdiction without interference from the federal courts. Ameritech Mobile insists that, to the extent that any relief considered by the Commission involves rates charged by Ameritech Mobile, such state action is preempted by Congress. From Ameritech Mobile's perspective this would include any findings relative to the absence of any specific rate charged between Ameritech Mobile's wholesale and retail operations or any findings resulting from a comparison of Ameritech Mobile's retail and wholesale rate offered to Cellnet (Ameritech Initial Br. at 32; Ameritech Reply Br. at 9, 10, 24, 25).

Cellnet explicates that, based on the Sixth Circuit order related to this matter, judicial decisions interpreting the Sixth Circuit decision, and the prior rulings issued by the Commission relative to the issue of preemption, this case is appropriately before the Commission for consideration (Cellnet Reply Br. at 17, 18).

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[50] Many of these same arguments were previously raised by AirTouch Cellular and other parties in this proceeding. Despite these arguments, the Commission previously determined that this count is properly before the Commission for consideration.

B. Enforceability of Commission's Orders and Guidelines

Ameritech Mobile argues that the Commission's orders in 84-944 and 86-1144, as well as the order and guidelines in 89-563, are not enforceable against Ameritech Mobile because they were not adopted as a rule pursuant to the statutory rulemaking procedures. Ameritech Mobile asserts that the Commission's actions in these cases were rules inasmuch as they signify standards having general and uniform operation. Ameritech Mobile further contends that Section 4927.03, Revised Code, further supports its belief that the alternative regulation pursued in 89-563 should have occurred in the context of a rulemaking (Ameritech Initial Br. at 34, 35). Since the 89-563 guidelines are actually rules, Ameritech Mobile contends that, pursuant to Section 111.15(B), Revised Code, the Commission should have filed two certified copies of the guidelines with the Secretary of State, the director of the Legislative Service Commission, and the Joint Committee on Agency Rule Review (JCARR) (*Id.* at 36).

AirTouch Cellular notes the fact that the orders issued in 84-944, 86-1144, and 89-563 signify nothing more than guidelines and are not tantamount to the enforceability of rules (AirTouch Initial Br. at 4-7).

In response to the arguments raised by Ameritech Mobile, Cellnet asserts that pursuant to Section 111.15, Revised Code, as clarified by the Ohio Budget Act (H.B. 215), enacted on June 30, 1997, all arguments are moot as to whether the 84-944 and 89-563 orders are subject to legislative review. Specifically, Cellnet points to the fact that pursuant to House Bill 215, Section 155, the JCARR filing requirements, as established by Section 111.15, Revised Code, applicable to the Commission on a prospective basis only, and are not retroactively applicable

to past Commission orders (Cellnet's Reply Br. to Ameritech at 20).

C. Lack of Cellnet's Standing to Proceed with the Complaint

By calling attention to the fact that Ameritech Mobile does not have, and has not had a business relationship with Cellnet, Ameritech Mobile claims that Cellnet does not have standing to proceed with its complaint pursuant to Section 4905.26, Revised Code. As support for its belief, Ameritech Mobile asserts that Cellnet does not have an immediate, pecuniary, nonspeculative interest as required by prior Commission determinations (Ameritech Initial Br. at 52).[51]

Despite Ameritech Mobile's arguments to the contrary, Cellnet asserts that the Commission, in its Entry of June 16, 1994, determined that Cellnet had appropriate standing to proceed with this complaint (Cellnet's Reply Br. at 26).

D. Commission Cannot Referee a Dispute Between Competitors

Ameritech Mobile contends that Cellnet's allegations are those of a would-be competitor and not those of a customer. Under such a scenario, Ameritech Mobile does not believe that the Commission has the jurisdiction to resolve disputes between competitors. Rather than utilizing Section 4905.26, Revised Code, in the capacity of a customer, Ameritech Mobile provides that Cellnet has exceeded the scope of Section 4905.26, Revised Code, by attempting to use the regulatory process to challenge the manner in which its competitor offers service. Related to this point, AirTouch Cellular relies on *Allnet Communications Services, Inc. v. Pub. Util. Comm.* (1988), 38 Ohio St. 2d 195, 198, to express its belief that the Commission

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[51] Ameritech Mobile references *LXL Group v. Ohio Bell Tel. Co.*, Case No. 88-993-TP-CSS, Opinion and Order, August 16, 1988.

should "not get dragged into skirmishes between competitors" (AirTouch Cellular Reply Br. at 7).

Cellnet addresses the fact that the Commission, in its Entry of April 27, 1994, rejected Ameritech Mobile's argument that the Commission cannot intervene in disputes between competitors (Cellnet Reply Br. at 26). Further, Cellnet states that it does not compete with the operations of Ameritech Mobile's wholesale operations. Instead, it relies on Ameritech Mobile's wholesale operations as a potential customer (Cellnet Reply Br. to Ameritech at 27, 28).

E. Cellnet's Failure to Amend its Complaint

Ameritech Mobile alleges that, although Cellnet, in its briefs, relies on the 89-563 Order and Guidelines, as well as the argument that Ameritech Mobile failed to account for revenue related to its affiliate transactions in its annual report filings with the Commission, "Cellnet's Third Amended Complaint" failed to reference either of these two propositions. Ameritech Mobile asserts that, if these two topics were to be properly considered by the Commission, Cellnet should have properly filed for leave to amend its complaint (Ameritech Reply Br. at 2).

Cellnet contends that Ameritech Mobile was put on notice of Cellnet's allegations pertaining to violations of 89-563. Specifically, Cellnet points to earlier references to the 89-563 violations in its "Clarification in Response to Commission Inquiry" filed on May 17, 1994, as well as the fact that Count IX of the third amended complaint also includes a reference to "89-563". Cellnet also references the fact that 89-563 was discussed throughout the hearing, including Ameritech Mobile's own counsel. Finally, Cellnet asserts that Civil Rule 15, Ohio Rules of Civil Procedure, allows for the amendment of the complaint to conform to the evidence presented at hearing.

V. DECISION RELATIVE TO PROCEDURAL DISPUTES

The Commission finds that its prior orders in Case Nos. 84-944, 86-1144, and 89-563, where appropriate, are applicable in the Commission's consideration of this case. The Commission issued its Opinion and Order in 89-563, including its "Guidelines for the Provision of Competitive Telecommunication Service," on October 22, 1993.

While Section 111.15, Revised Code, requires that governmental agencies, this agency inclusive, must file two copies of the full text of a proposed rule with JCARR at least 60 days before such rule is to be filed with the Secretary of State and the Legislative Service Commission, the Commission agrees with Cellnet's arguments asserting that the Commission's 84-944 and 89-563 were not subject to the JCARR filing requirement. The legislature clearly intended that the application of Section 111.15, Revised Code, to this Commission was not to commence until June 30, 1997, and was applicable on a prospective basis only. Section of 155 H.B. 215 clearly addresses the fact that a Commission rule adopted prior to this effective date, and which was not submitted for legislative review, is ratified, insofar as that omission otherwise may raise a question with respect to the validity of the rule. Therefore, the 89-563 guidelines approved on October 22, 1993, as well as the Commission's even earlier determinations in 84-944 and 86-1144 were constructively ratified.

As further justification for this conclusion, the Commission notes that in policy considerations addressed by the Commission prior to the application of Section 111.15, Revised Code:

> The Commission has, on numerous prior occasions without challenge, adopted guidelines to effectuate competitive policies in lieu of promulgating O.A.C. rules. By doing so, the Commission has relaxed and streamlined regulatory

obligations which have benefited all telephone companies. Examples of such cases include 84-944, 86-1144, 89-563, 564, and 1149.

In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI, June 12, 1996, Finding and Order at 10.

Specific to this point, the Commission calls attention to the fact that Ameritech Mobile has itself benefited from the Commission's past practice, as evidenced by Ameritech Mobile and AirTouch Cellular availing itself of the detariffed treatment provided pursuant to the Commission's orders in 89-563 and ultimately in Case No. 97-1700-TP-COI (99-1700), *In the Matter of the Commission Investigation Into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*. It appears to be disingenuous for Ameritech Mobile to now argue inapplicability of 84-944 and 89-563 in response to a complaint alleging its failure to comply with some of the remaining requirements placed on competitive telecommunication service providers. Additionally, the Commission specifically stated its expectation that entities subject to the guidelines will act in good faith and respect the Commission's overall intent and purpose in creating the guidelines (89-563 Finding and Order at 5). The Commission finds that by affording themselves of the benefits of the 89-563 guidelines, while now questioning the applicability of the guidelines and the related order, Ameritech Mobile and AirTouch Cellular have violated the intended purpose of these regulatory provisions.

The Commission concludes that it has previously addressed the arguments raised by Ameritech Mobile with respect to Cellnet's standing to proceed with its allegations despite the fact that complainant is not an actual customer of Ameritech

Mobile. Specifically, the Commission, in its Entry of June 16, 1994, rejected respondent's arguments that Cellnet does not have sufficient standing to pursue the allegations stated in its complaint based on the fact that Cellnet is not an actual customer of the respondent (Entry of June 16, 1994, at 12). The Commission also highlights the fact that pursuant to Section 4905.26, Revised Code, a complaint can proceed based on allegations that a rate proposed to be charged is unjust, unreasonable, unjustly discriminatory, preferential, or in violation of law. Therefore, the Commission may proceed with its consideration of a complaint despite the fact that a complainant is a potential, and not an actual customer of the respondent.

Specific to Ameritech Mobile's contention that the Commission cannot referee disputes between competitors, the Commission specifically finds that the regulatory construct for the cellular industry is unique inasmuch as the primary regulatory focus of the Commission is related to the wholesale operations of the regulated entities, while the Commission is also cognizant of the fact that the cellular entities maintain retail operations as well. This focus can be attributed to both statutory limitations, as well as the fact that FCC licensing has been historically tied to the wholesale operations.

With respect to the complaint before us, the Commission considers the current complaint to be predominantly centered around the respondents' capacity as wholesale providers. In this context, the relationship of the complainant and respondents is one of customer and supplier. Although the complainant and the respondents may also be competitors at the retail level, this is not the focus of the Commission's consideration in this matter. Rather, the Commission is focused on the supplier/customer relationship. Any analysis of the respondents' retail operations is limited in context to the issue of whether or not the respondents have properly separated their

wholesale operations for the purpose of allowing the Commission to properly determine that respondents have afforded nonaffiliated resellers the treatment prescribed by the applicable statutory provisions and the applicable Commission orders.

In regard to the issue of preemption, the Commission concludes that this matter has been thoroughly discussed at length in our prior decisions.[52] Nothing new has been raised which would warrant the Commission deviating from our prior decisions that this matter is properly before us, and that consideration of this matter is not prohibited by the Sixth Circuit decision. In considering the allegations raised in this complaint, the Commission has simply engaged in an analysis of whether the respondents have violated the law. If the Commission finds that the respondents have violated the law, then a court of competent jurisdiction will address the issue of whether the violation results in an injury to Cellnet and the amount of damages involved.

The Commission specifically calls attention to the fact that any determination to be issued in this case is retrospective in nature. In its Finding and Order of December 16, 1999, in 97-1700, the Commission instituted the new regulatory scheme under which commercial mobile radio service providers are to operate. The determinations issued in 97-1700 remain intact and are not affected by this determination.

In regard to Cellnet's alleged failure to amend its complaint, the Commission concludes that all parties were clearly aware of Cellnet's reliance on 89-563 in this case. This is no more apparent than in Ameritech Mobile's cross-examination of Cellnet witness Tricarichi as to whether the complaint accuses Ameritech Mobile and other respondents of violating the terms

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[52] *See* Commission entries of February 26, and October 7, 1998 in this case.

of 89-563 (Tr. I, 163). Therefore, the Commission believes that the record clearly establishes that no undue surprise or harm has resulted from the Commission's consideration of any violations of 89-563. In fact, witnesses of both Ameritech Mobile and AirTouch Cellular were questioned at length with respect to 89-563, with no objection being raised. Finally, the Commission concludes any consideration of compliance with the Commission's orders would be incomplete in the absence of consideration of 89-563. Therefore, the Commission finds it appropriate to consider any relevant violations in the context of this complaint case.

With respect to Cellnet's references to annual report filings, the Commission does not view these references as additional allegations. Rather, the Commission considers such references as illustrative support for its allegations of discrimination.

VI. ARGUMENTS RELATIVE TO THE COUNTS OF THE COMPLAINT

A. Count I — Separate Operations, Separate Accounting, and Separate Contracts With Respect to Ameritech Mobile

1. Cellnet Relative to Ameritech Mobile (Count I)

Cellnet asserts that the 84-944 and 89-563 orders require that commercial mobile radio service providers must maintain separate operations and separate accounting, including detailed records of transactions between the wholesale and retail affiliates. In addition, Cellnet states that, pursuant to these orders, all services between Ameritech Mobile's wholesale and retail affiliates are to be conducted on a contract basis (Cellnet Initial Br. to Ameritech at 12, 13). Cellnet conjectures that the Commission, pursuant to its 84-944 and 89-563 orders, established the scope of the requisite record keeping by identifying that the purpose was to provide the ability to

determine the rates, terms, and conditions upon which service is offered by a cellular wholesale arm to its retail affiliate (Cellnet Reply Br. to Ameritech at 3).

Cellnet alleges that, although Ameritech Mobile has afforded itself of the benefits of deregulating its retail operations, it never appropriately separated its wholesale and retail operations as required by the Commission. In support of its contentions, Cellnet focuses on the admission of Mr. Alan Ferber, the general manager of wholesale operations for Ameritech Mobile, who stated that Ameritech Mobile does not run its wholesale/retail operations in the manner reflected in the diagram depicted in Cellnet Exhibit 34. Based on this diagram, Cellnet inquired whether Ameritech Mobile established its operations in a manner whereby Ameritech Mobile's wholesale affiliate would sell service to both Cellnet and Ameritech Mobile's retail affiliate pursuant to identical rates, terms, and conditions (Tr. I, 177; Tr. II, 81, 85; Cellnet Initial Br. to Ameritech at 12, 13).

Similarly, Cellnet points to the fact that Ameritech Mobile's executives were unfamiliar with a Commission directive regarding separation of wholesale and retail operations. Specific to this point, Cellnet relies on the testimony of Jay Ellison, regional vice president and marketing manager for Ameritech Mobile's wholesale and retail operations until 1995, and Mr. Alan Ferber, who succeeded Mr. Ellison. Cellnet insists that both individuals acknowledged their unfamiliarity with the separation directives established in the 89-563 order (Tr. I, 63; Tr. II, 82; Cellnet Initial Br. To Ameritech at 14, 15). As further support for its allegations in Count I, Cellnet points to the fact that Mr. Ferber stated that Ameritech Mobile's retail affiliate is entitled to some advantage because of the fact that Ameritech Mobile's wholesale affiliate had invested infrastructure (Tr. II, 85). Cellnet concludes that this interaction between Ameritech Mobile wholesale and Ameritech Mobile

retail was a violation of the requirement that Ameritech Mobile retail receive no preferential treatment from Ameritech Mobile wholesale as established by the 84-944 and 89-563 orders (Cellnet Initial Br. To Ameritech at 15).

Despite the required separation of operations between Ameritech Mobile's retail and wholesale affiliates, Cellnet identifies the fact that Ameritech Mobile officials acknowledged that the nonaffiliated wholesale rate is, at least partially, based on the potential impact on the number of Ameritech Mobile's retail customers (Tr. II, 77, 78). Cellnet asserts that this interaction between the wholesale and retail operations is a violation of the directives of the Commission (*Id.* at 16).

As further substantiation of its allegations regarding the lack of separation between Ameritech Mobile's wholesale and retail affiliates, Cellnet focuses on Ameritech Cellular's testimony that it did not include in its annual report filing with the Commission any transactions between the wholesale and retail arms. Rather, the annual report filing included solely those transactions between Ameritech Mobile's wholesale and nonaffiliated resellers (Tr. III, 20; Cellnet Initial Br. To Ameritech at 17, 18; Cellnet Reply Br. to Ameritech at 4, 5). Further, Cellnet contends that Ameritech Mobile has acknowledged that there are no records that demonstrate transactions between its wholesale and retail affiliates (Tr. III, 32, 33; Cellnet Reply Br. to Ameritech at 4). This would include the failure to maintain records that reflect a rate for transactions between the wholesale and retail arms (Cellnet Initial Br. to Ameritech at 18).

Finally, based on the record and Cellnet's requested discovery (Cellnet Ex. 43), Cellnet contends that no records were maintained by Ameritech Mobile's wholesale affiliate to

reflect all inquiries from potential resale customers and all transactions between it and nonaffiliated resellers (*Id.* at 19).

2. Ameritech Mobile Response (Count I)

Ameritech Mobile states that the present and former controllers of Ameritech Mobile and paging operations testified at the hearing regarding the company's accounting structure. Specifically, Ameritech Mobile points to the testimony of Michael Franz, controller from June 1995 to July 1998, and Mr. Gilbert Wolf, who succeeded Mr. Franz in 1998. Based on the general ledgers of revenues and expenses contained in Cellnet Exhibit 40, Ameritech Mobile believes that it has demonstrated the existence of separate accounting for its wholesale and retail operations (Ameritech Initial Br. at 12, Reply Br. at 18).[53] Ameritech Mobile further asserts that it has never received any direction from the Commission relative to the manner in which its wholesale and retail accounting should be maintained (Ameritech Initial Br. at 51; Ameritech Reply Br. at 18).[54] Ameritech Mobile insists that there is nothing in Generally Accepted Accounting Principles (GAAP) which directs whether an account should be treated as wholesale or retail (Ameritech Initial Br. at 12, 13).

Ameritech Mobile concludes that the record in this matter establishes that it maintains separate accounting records for its wholesale and retail affiliates. As support for this claim Ameritech Mobile relies on the testimony of Mr. Michael Franz and Mr. Gilbert Wolf (*Id.* at 11; Tr. III, 14, 15, 23, 24, 37).

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[53] For those features common to both wholesale and retail, Ameritech Mobile represents that most are free to resellers (Ameritech Reply Br. at 19).

[54] Ameritech Mobile states that the Commission staff has never performed an audit to determine its compliance with the 89-563 directives (Ameritech Initial Br. at 50).

Ameritech Mobile rejects any argument that it is required, in accordance with the 89-563 orders, to provide service to its affiliated reseller pursuant to a tariff or an intracompany contract. It points out that wholesale service was detariffed on May 14, 1993. In addition, inasmuch as Ameritech Mobile's wholesale and retail arms are not two separate legal entities, Ameritech Mobile believes that it is legally not permitted to enter into a legal contract with itself (Ameritech Reply Br. at 6).

Additionally, Ameritech Mobile rejects any interpretations that the 84-944, 86-1144, and 89-563 orders established a mandatory requirement to maintain separate wholesale and retail operations. Rather, Ameritech Mobile interprets those orders to provide a regulatory exemption to the affiliated retail arm provided that the cellular provider chooses to maintain a separate set of accounting records for the retail and wholesale operations and provided that the affiliated reseller has no involvement whatsoever in the wholesale operations of the underlying carrier. Ameritech Mobile believes that, based on the language of the 89-563 order, even if the separation provisions are not followed, the resulting ramification is the re-regulation of the retail operations, and not a cause of action pursuant to Section 4905.26, Revised Code (Ameritech Initial Br. at 39-42; Ameritech Reply Br. at 5, 6). Pursuant to Ameritech Mobile's reasoning, any potential violation of the Commission's orders correlates to a duty owed to the Commission, and not resellers such as Cellnet (Ameritech Initial Br. at 44). Therefore, Ameritech Mobile concludes that these requirements did not establish a private right of action (*Id.* at 46).

With respect to the condition that the affiliated reseller have no involvement whatsoever in the wholesale cellular provider's operations, Ameritech Mobile calls attention to the fact that, on rehearing in 89-563, the Commission had specifically stated

that the sharing of employees between retail and wholesale operations was permissible (Ameritech Reply Br. at 6, 7).

(a) Ruling: Count I — Relative to Ameritech Mobile

As early as its Opinion and Order in 84-944, the Commission determined that cellular wholesale (underlying) providers were to be afforded relaxed regulatory treatment in lieu of the traditional regulatory requirements. This regulatory treatment included certain pricing flexibility in response to the development of competition in the cellular industry. The Commission specifically provided that cellular resellers which are affiliated with the underlying carrier do not fall within the statutory definition of a telephone company provided the affiliated reseller's operations are maintained under a separate set of accounting records from the operations of the underlying carrier and, further, provided that the affiliated reseller has no involvement whatsoever in the wholesale operations of the underlying carrier "other than as a customer on equal terms as any nonaffiliated cellular reseller" (84-944 Opinion and Order at 10). In its 84-944 Entry on Rehearing of June 4, 1985 (84-944 Entry on Rehearing), the Commission clarified that, pursuant to the 84-944 order, affiliated resellers will be purchasing blocks of numbers from the underlying carrier pursuant to the same tariff and same terms as nonaffiliated resellers.

In our October 22, 1993, Finding and Order in 89-563, the Commission concluded that the cellular industry was entitled to additional regulatory relief by temporarily waiving the tariff and contract filing provisions related to services provided by the underlying wholesale carrier to its nonutility resale or end user customers (89-563 Finding and Order at 21).

Pursuant to the 89-563 Finding and Order, the Commission continued to maintain the requirement established in the 84-944

Opinion and Order "that a cellular reseller which is affiliated with the wholesale cellular carrier and which is not involved in any manner with routing, transmitting, receipt of signals, or conversion of signals, will not be considered a competitive service provider or telephone company provided the affiliated reseller's operations are maintained under a separate set of accounting records from the operations of the wholesale cellular provider and, further, provided that the affiliate reseller has no involvement whatsoever in the wholesale cellular provider's operations" (89-563 Finding and Order at 22). This requirement was intended to permit a subsequent review of transactions between the underlying wholesale carrier and its affiliated reseller for the purpose of ascertaining whether "the affiliated reseller received access to any cellular services, or any component bundled therewith, at prices and/or terms and conditions different from those available to nonaffiliated resellers" (89-563 Finding and Order at 22).

In addition to requiring the underlying wholesale carrier to maintain a written detailed record of transactions between the underlying wholesale carrier and its affiliated resale or end user customers, the Commission, in its 89-563 Finding and Order, required that the underlying wholesale carrier maintain written comprehensive records of all inquiries from potential resale customers and all transactions entered into between it and nonaffiliated resellers and its end users customers (89-563 Finding and Order at 22).[55]

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[55] Pursuant to the December 16, 1999 Finding and Order in 97-1700, the Commission, on a going forward basis, eliminated the requirement that cellular providers maintain separate wholesale and retail operations and the requirement that cellular providers maintain records of all transactions between their affiliated and nonaffiliated customers. As referenced in the 97-1700 Finding and Order, this determination was prospective in nature and is not applicable to the Commission's consideration of this complaint case (97-1700 Finding and Order at 18).

Based on the above review of regulatory obligations, it is clear that, as early as April 9, 1985, upon the issuance of the 84-944 Opinion and Order, as subsequently clarified by the 89-563 order, the Commission stated its intended purpose behind the requirements that (1) cellular providers maintain separate accounting records for their wholesale and retail operations, (2) that wholesale cellular providers maintain written detailed records of transactions between it and its affiliated resale arm or end user customers, and (3) wholesale cellular providers maintain comprehensive records of all inquiries from potential resale customers and all transactions entered into between it and unaffiliated resellers. All cellular providers were placed on notice regarding the obligation to appropriately maintain records in such a fashion in order to allow for an effective determination as to whether wholesale cellular licensees are providing access pursuant to terms and conditions that are available on a nondiscriminatory basis. The language in the 89-563 Finding and Order clearly reflects that these were mandatory terms and were not intended to be voluntary conditions tied to the regulation or nonregulation of the affiliate's retail arm. The Commission would further note that, although both the 84-944 Opinion and Order and the 89-563 Finding and Order spoke to the issue of maintaining appropriate accounting records, no rehearing or request for clarification was sought by the Ameritech Mobile affiliates or AirTouch Cellular affiliates certified at such time with respect to these directives.

The 84-944 and 89-563 orders do not specifically speak to the actual remedy to be implemented in the event that the Commission ultimately determined that a cellular company failed to maintain a separate set of accounting records or failed to ensure that the affiliated retail arm had no involvement whatsoever in the wholesale operations of the underlying carrier other than as a customer on equal terms as any nonaffiliated cellular reseller. While re-regulation of a cellular

company's retail operations may be one remedy, it is not the exclusive one. No Commission order precluded the filing of a complaint case, such as this one currently before the Commission, pursuant to Section 4905.26, Revised Code, or any other actions that the Commission would deem appropriate.

With respect to Cellnet's allegations against Ameritech Mobile, the Commission finds that for the time frame 1993-1998, as reflected by Cellnet Exhibit 40, Ameritech Mobile has failed to maintain its records in a manner which would satisfy the objectives and intent of the regulatory framework established in both the Commission's 84-944 and 89-563 orders. As early as the June 4, 1985 Entry on Rehearing in 84-944, the Commission stated that, pursuant to its order, affiliated resellers will be purchasing blocks of cellular numbers from the underlying cellular carriers pursuant to the same tariff on the same terms as nonaffiliated resellers (84-944 Entry on Rehearing at 6).

As noted above, the Commission's overriding purpose relative to the issue of the requisite record keeping discussed in both the 84-944 and 89-563 orders was to allow for "...a subsequent review of transactions between the underlying wholesale carrier and its affiliated reseller in order to determine whether or not the affiliated reseller received access to any cellular services, or any component bundled therewith, at prices and/or terms and conditions different form those available to any nonaffiliated resellers" (89-563 Finding and Order at 22).

Despite Ameritech Mobile's belief that it has satisfied its regulatory obligations through its accounting ledgers contained in Cellnet Exhibit 40, which designated accounts as being either retail/wholesale or both, the Commission finds that the ledgers fail to provide a mechanism to engage in an analysis contemplated by the 84-944 and 89-563 orders. This conclusion is supported by the acknowledgement of Mr. Michael Franz

that Ameritech Mobile does not maintain any accounting records which would provide the rate which Ameritech Mobile's wholesale affiliate charges Ameritech Mobile's retail affiliate for service (Tr. III, 16-18). Interestingly, representatives of Ameritech Mobile admitted that they were unable to identify the rate paid by Ameritech Mobile to Ameritech Mobile's retail affiliate and, at best, could only speculate as to what the rate would be based on assuming a hypothetical affiliate wholesale rate was developed (*Id.* at 57, 80, 81, 103-107). Mr. Franz even discussed the fact that Ameritech Mobile had unsuccessfully attempted to develop an affiliated wholesale rate (*Id.* at 18).

In accordance with Appendix A, Section II.K.2.a., attached to the Commission's December 22, 1993 Entry on Rehearing in 89-563, all services purchased by the affiliated reseller from the affiliated wholesaler must be via tariff or pursuant to contract. While these contracts were not required to be filed, the Commission did require that the wholesale affiliate maintain a written detailed record of transactions between it and its retail affiliate (89-563 Finding and Order at 22). The Commission finds that the record substantiates that Ameritech Mobile has not maintained detailed records of transactions between its wholesale and retail affiliates or records of inquiries for cellular service, as required by the Commission's 89-563 Finding and Order (Tr. I, 62; Tr. III, 16, 32, 33, 57).

Additionally, the Commission is troubled by the fact that the annual reports filed by Ameritech Mobile do not include transactions between Ameritech Mobile's wholesale and retail affiliates but, rather, only those charges related to nonaffiliated resellers and some corporate accounts (Tr. III, 21, 22, 33). The Commission concludes that Ameritech Mobile's failure to include revenues related to affiliated transactions is a direct result of its failure to maintain this information as required by prior Commission orders.

With respect to Cellnet's allegations pertaining to the failure to maintain separate wholesale and retail operations, the Commission also focuses on the directives of both the 84-944 Opinion and Order and the 89-563 Finding and Order which clearly stated that the affiliated reseller should have no involvement whatsoever in the wholesale cellular provider's operations (84-944 Opinion and Order at 10; 89-563 Finding and Order at 22). It is also clear from the Commission's orders that this requirement was not solely about a duty owed to the Commission with respect to the regulation of retail operations. To the contrary, the Commission expressly stated that "it is necessary that Cellular licensees provide access to its cellular service pursuant to terms, conditions, and prices that are universally available on a nondiscriminatory basis to all customers, affiliated and non-affiliated alike" in order to prevent frustration of the public policy respecting resale (89-563 Finding and order at 22). The Commission went on to describe the records which would be required for the Commission to ensure against potential discriminatory and anticompetitive conduct by wholesale providers against unaffiliated resellers.

The Commission finds that Ameritech Mobile is in violation of the Commission's order regarding the separation of its wholesale and retail operations. In support of this conclusion, the Commission references the acknowledgement of Mr. Alan Ferber, General Manager of Wholesale Operations, who oversees the relationship between Ameritech Mobile's wholesale and nonaffiliated resellers, that the operations of Ameritech Mobile are not structured in the manner described in Cellnet Exhibit 34[56] for sales and marketing (Tr. III, 81, 82, 103). The Commission finds it very telling that Mr. Alan Ferber

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[56] Cellnet Exhibit 34 assumed a separation of Ameritech Mobile's wholesale and retail whereby Ameritech Mobile's retail purchases service from Ameritech Mobile's wholesale.

himself acknowledged that it is difficult for him to think in terms of the construct of Ameritech Mobile's retail and Ameritech Mobile's wholesale (Tr. II, 84-85). From this statement, the Commission concludes that Ameritech Mobile was not separating its wholesale and retail in its normal course of business. As further support for this conclusion, the Commission relies on the representations contained in the affidavit filed on behalf of Ameritech Mobile on May 7, 1985, in Case No. 83-1308-RC-ACE, *In the Matter of the Application of the Cincinnati SMSA Limited Partnership for a Certificate of Public Convenience and Necessity to Provide Domestic Public Cellular Radio Telecommunication Service to the Greater Cincinnati Metropolitan Area*. Specifically, Ameritech Mobile attested that its retail operations will be a separate unincorporated division which purchases service from its wholesale affiliate pursuant to its wholesale tariff and on the same terms and conditions available to competing resellers. Further, Ameritech Mobile represented that separate accounting records are maintained for its retail division.

The Commission also finds it troubling that high-ranking Ameritech Mobile company officials overseeing Ohio wholesale operations admitted to their unfamiliarity with the controlling Commission dockets such as 89-563 and the requirements relative to the provisioning of service between Ameritech Mobile wholesale and its affiliated retail arm. This would include Mr. Alan Ferber and Mr. Ellison who, as regional vice president for Ohio from 1992 — April 1995, was in charge of both retail and wholesale operations in Ohio (Tr. I, 59, 63; Tr. II, 82).

Finally, the Commission agrees with Cellnet's objections relative to the reliance on Ameritech Mobile's retail pricing for the purpose of establishing Ameritech Mobile's wholesale prices. As described above, pursuant to the original regulatory scheme established in 84-944, the Commission intended that

there be no involvement whatsoever in the wholesale carrier's operations (84-944 Opinion and Order at 10). Based on the Commission's holding in its June 4, 1985 Entry on Rehearing in 84-944, it is apparent that the Commission intended for Ameritech Mobile's resale affiliate to be a customer of Ameritech Mobile's wholesale affiliate on equal terms and conditions as an nonaffiliated customer (84-944 Entry on Rehearing at 6). Therefore, Ameritech Mobile's practice of establishing wholesale rates for nonaffiliated carriers by first consulting with Ameritech Mobile's retail employees relative to the potential impact on Ameritech Mobile's retail business violated the Commission's 84-944 and 89-563 orders (Tr. II, 76-80).

3. Cellnet Relative to AirTouch Cellular (Count I)

Cellnet asserts that AirTouch Cellular has failed to prevent involvement between its wholesale and retail operations. Cellnet alleges that, at all times, AirTouch Cellular never created separate wholesale and retail operations. Therefore, AirTouch Cellular operated a single integrated company with no distinctions between retail and wholesale (Cellnet Initial Br. to AirTouch at ix).

In support of its argument, Cellnet points to the acknowledgement of Leigh Wood, former CEO of AirTouch Cellular's Ohio operations, and Greg Gorelick, former controller of AirTouch Cellular, who both acknowledged that, from 1984 to 1996, AirTouch Cellular's wholesale and retail activities were not operationally separate (Cellnet Initial Br. to AirTouch at 8; Cellnet Ex. 201, at 96, 97).

As further support, Cellnet states that in many instances, AirTouch Cellular's retail rates to its end users are lower than the rates charged to Cellnet at the wholesale level (Cellnet Initial Br. to AirTouch at 7). In addition, Cellnet contends that AirTouch Cellular's wholesale affiliate provides more

favorable rates, terms, and conditions to AirTouch Cellular retail arm than it provides to Cellnet. As an example, Cellnet highlights the fact that, as denoted by Mr. Tricarichi, AirTouch Cellular's retail arm had access to AirTouch Cellular's wholesale switch from 1991 to the present. As a result of this access, Cellnet alleges that AirTouch Cellular's retail arm could make changes to retail end user service without first going through the wholesale affiliate (Tr. IV, 207; Cellnet Initial Br. to AirTouch at 9).

Cellnet also identifies the fact AirTouch Cellular's retail affiliate had access to proprietary Cellnet end user information (Tr. IX, 50-53; Cellnet Initial Br. to AirTouch at 9). Specifically, Cellnet points to the fact that, through the tracking of electronic serial number information, AirTouch Cellular's wholesale affiliate identified to AirTouch Cellular's retail arm those customers that had switched to Cellnet's service, as well as the rates that Cellnet was being charged by AirTouch Cellular's wholesale affiliate (Tr. IX, 51-53, 55, 59, 62; Cellnet Initial Br. to AirTouch at 10; Cellnet Ex. 215).

This conduct was in violation of the 84-944 and 89-563 requirement to maintain separate operations (Cellnet Initial Br. to AirTouch at 4, 5). Cellnet argues that, as a result of AirTouch Cellular's wholesale affiliate providing service to its affiliated retail arm at a lower rate and on more favorable conditions, it has eliminated the "level playing field" scenario which was sought by the Commission in its 89-563 order (*Id.* at 6). Based on the alleged circumstances, Cellnet states that it would have to operate at a loss just to match AirTouch Cellular's retail rates (*Id.* at 7).

Cellnet rejects any interpretation of the 89-563 order which would justify the offering of more favorable rates and terms and conditions to AirTouch Cellular's retail operations due to a differential in size between AirTouch Cellular retail and

Cellnet. Cellnet surmises that, if the offering of more favorable rates and terms is permitted, there could not be any new market entrants since AirTouch Cellular retail would always have the most favorable terms and conditions (*Id.* at 7).

Cellnet contends that AirTouch Cellular retail had complete involvement in setting AirTouch Cellular's wholesale rates, thus violating the 89-563 requirement that there be no involvement whatsoever in the operations of the underlying carrier. Specifically, Cellnet refers to the fact that AirTouch Cellular's pricing, planning, and analysis department is responsible for the establishment of wholesale rates charged to nonaffiliated resellers. Despite this responsibility, Mr. Michael Yoder, who has worked in this department since 1994,[57] was unaware of the separation of AirTouch Cellular's wholesale and retail operations and was unfamiliar with AirTouch Cellular charging its own retail operations anything for service (Tr. X, 123, 124, 125; Cellnet Initial Br. to AirTouch at 15). Cellnet asserts that, since at least 1991, AirTouch Cellular's nonaffiliated wholesale charges have been dependent upon AirTouch Cellular's retail rates, in violation of the 89-563 order requirement on maintaining separation between AirTouch Cellular's wholesale and retail operations (Cellnet's Initial Br. at 11, 15-17).

Cellnet further alleges that AirTouch Cellular's retail operations are involved in limiting the number of end user customers that Cellnet can serve. This impact results from the fact that when promotions are offered by AirTouch Cellular retail, AirTouch Cellular wholesale will sometimes, but not always, also offer a promotion to Cellnet to reflect some value of the retail promotion; however, this value is not the same as that offered at retail (*Id.* at 17, 18). At best, AirTouch Cellular

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[57] As of the time of his testimony, Mr. Yoder was the director of pricing, planning, and analysis.

provides some promotion to Cellnet which has a value less than the promotion provided to AirTouch Cellular's retail arm and limits the percentage of Cellnet's end user customers to whom Cellnet can make the promotional offer. No such percentage limitations are placed on AirTouch Cellular's retail customers (*Id.* at 17-20).[58] Specific to AirTouch Cellular's retail equipment promotions, Cellnet is not given any promotion to account for the value of the equipment (*Id.* at 18).

Cellnet discounts any accounting which AirTouch Cellular may have performed to differentiate the revenues and expenses of its wholesale operations. These endeavors were not contemporaneous, but rather were retrospective in nature. Therefore, such accounting was not relied on for decision-making purposes or for the purpose of satisfying the Commission's stated desire that all wholesale customers be treated equally. Specifically, Cellnet emphasizes that AirTouch Cellular never incurred any real cost of acquiring airtime. As a result, Cellnet asserts that AirTouch Cellular's records do not constitute the type of accounting contemplated by the 84-944 and 89-563 orders (Cellnet Reply Br. to AirTouch at 10).

Cellnet questions whether the expense allocation methodology utilized by AirTouch Cellular properly allocated expenses between AirTouch Cellular's wholesale and retail operations. Rather than considering where the costs were incurred, Cellnet finds fault in AirTouch Cellular's expense allocation based solely on the percentage of revenue attributable to wholesale or retail regardless of where the costs were truly incurred (*Id.* at 11).

Finally, with respect to Count 1, Cellnet asserts that the record in this case establishes that AirTouch Cellular failed to

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[58] This limitation is based on the number of AirTouch Cellular's retail customers expected to avail themselves of the retail promotion (Tr. XII, 93, 94, 95).

maintain a written detailed record of transactions between its wholesale and retail operations as required by the 89-563 order (Cellnet Initial Br. to AirTouch at 21).

4. AirTouch Cellular Response (Count I)

AirTouch Cellular argues that the 84-944 and 86-1144 orders did not establish any affirmative requirement that cellular service carriers doing business in Ohio create or maintain separate wholesale or retail operations or accounting (AirTouch Initial Br. at 3-5). With respect to the 89-563 order,[59] AirTouch Cellular similarly argues that the 89-563 order failed to impose an affirmative obligation upon cellular providers to maintain separate wholesale and retail operations and accounting. AirTouch Cellular surmises that, at best, the only consequence of its failure to maintain an affiliated reseller is that the cellular retail operations will fall within the definition of a telephone company (*Id.* at 15). With respect to the issue of structural separations, AirTouch Cellular references the Commission's clarification in its 89-563 Entry on Rehearing at 4, in which the Commission clarified that "separate operations" does not mean structural separation, and that the wholesale and retail operations could share employees (*Id.* at 12, 13).

Although AirTouch Cellular insists there is no affirmative obligation to do so, it represents that it has maintained, in good faith, separate wholesale and retail operations since it began operations in Ohio. As evidence of this contention, AirTouch Cellular centers its attention on its wholesale and retail accounting records depicted in Cellnet Exhibit 103 and AirTouch Cellular's Exhibits 12 and 13 for the years 1993, 1994, 1995, 1996, and 1997 (*Id.* at 8, 9). As explained in the testimony of Patrick Bennett, for the purpose of calculating wholesale revenue for each Ohio market, AirTouch Cellular

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[59] AirTouch Cellular mentions the fact that 89-563 was not mentioned in Cellnet's third amended complaint (AirTouch Initial Br. at 3).

multiplies the number of subscribers, rather than directories, and the total number of airtime minutes sold in Ohio by the most favorable access charges and per minute rates available to resellers for the pertinent time frame. All expenses are allocated between wholesale and retail either as direct or allocated expenses (*Id.* at 9, 10).[60] AirTouch Cellular opines that, even if the Commission intended to require all cellular carriers to maintain separate wholesale and retail accounting, it did not prescribe the manner in which it should be performed (*Id.* at 12).

With respect to Cellnet's allegations regarding the improper sharing of Cellnet specific information between AirTouch Cellular wholesale and retail affiliates, AirTouch Cellular contends that this activity stopped in 1994 at Cellnet's request (Tr. IX, 52; AirTouch Cellular Reply Br. at 12). AirTouch Cellular opines that the shared rate information was already publicly available via the rate plans on file in AirTouch Cellular's tariffs. Any checking of electronic serial numbers of former AirTouch Cellular retail customers was done simply to eliminate the potential of a former AirTouch Cellular customer receiving a bill from both AirTouch Cellular and their new provider (Tr. IX, 50-53).

AirTouch Cellular contends that there is no statutory basis pursuant to Section 4905.54, Revised Code, for the allegations contained in Count I. Specifically, AirTouch Cellular avers that, since the 89-563 order was enacted pursuant to Section 4927.03, Revised Code, Section 4905.54, Revised Code, is not applicable (AirTouch Initial Br. at 13).

Finally, AirTouch Cellular dismisses any of Cellnet's objections as to the use of retail rates in deciding the level of

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[60] For the time frame 1991-1994 allocations were performed based on gross revenue. For the time frame 1995-1997, allocations were performed based on gross margin (AirTouch Initial Br. at 10).

establishing wholesale rates. AirTouch Cellular insists that the reliance on retail rates is necessary for the purpose of assuring a margin for its resellers (AirTouch Reply Br. at 16).

(a) Ruling: Count I — Relative to AirTouch Cellular[61]

As discussed above, the Commission in its Entry on Rehearing in 84-944, clearly defined its intentions with respect to the manner in which cellular wholesale providers were to treat both affiliated and nonaffiliated resellers. Specifically, the Commission determined that "affiliated resellers, under the terms of our order, will be purchasing blocks of cellular numbers from the underlying cellular carriers pursuant to the same tariff and on the same terms as nonaffiliated resellers" (84-944 Entry on Rehearing at 6). Pursuant to the Commission's language relative to the purchasing of service by the affiliated retail arm, it is clear that the Commission intended that there be an actual transaction between the affiliated wholesale and retail arms similar to the purchase by the nonaffiliated retail arms. This belief is further supported by the representations contained in the affidavit filed on behalf of AirTouch Cellular on April 30, 1985, in Case No. 84-687-RC-ACE, *In the Matter of the Application of Northern Ohio Cellular Telephone Company for a Certificate of Public Convenience and Necessity to Provide Domestic Public Cellular Radio Telecommunication Services in the Cleveland Standard Metropolitan Statistical Area and Vicinity.* Specifically, AirTouch Cellular attested that its retail operations will be handled separately from its wholesale operations and will be maintained under a separate set of accounting records. AirTouch Cellular further represented that its retail affiliate will

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[61] For the purpose of this ruling, the Commission incorporates the discussion of the 84-944 and 89-563 decisions contained in Count I — Relative to Ameritech Mobile above.

be treated on the same terms as all competing resellers. Despite these facts, Mr. Minardo, the AirTouch Cellular employee responsible for AirTouch Cellular's nonaffiliated wholesale operations, stated that he was unaware that there was an AirTouch Cellular wholesale and an AirTouch Cellular retail or that the retail affiliate was supposed to purchase service from the wholesale affiliate (Tr. XII, 104).

Consistent with this principle, the Commission, in its 89-563 Opinion and Order clearly pronounced its intention that the accounting records be maintained in a manner to allow for a review of transactions between the underlying wholesale carrier and its affiliated reseller in order to determine whether or not the affiliated reseller received access to any cellular services, or component bundled therewith, at prices and/or terms and conditions different from those available to nonaffiliated resellers (89-563 Finding and Order at 22). Following the detariffing of cellular service pursuant to 89-563, the maintenance of proper transaction records became even more important inasmuch as it became the primary mechanism by which the Commission could monitor the conduct of wholesale cellular providers. Therefore, the requirement to maintain the appropriate records was unconditional on all cellular providers, including AirTouch Cellular, regardless of the regulatory status of the companies' retail operations.

With respect to the records maintained by AirTouch Cellular as reflected by Cellnet Exhibit 103, irrespective of the issue of whether records were maintained consistent with generally acceptable accounting principles, the Commission notes that these records were not maintained on a contemporaneous basis but, instead, were created subsequent to the end of each year of operation (Tr. VI, 141, 142). In addition, AirTouch Cellular admitted that it did not maintain detailed records of transactions between AirTouch Cellular's wholesale and retail operations (*Id.* at 91, 92; Cellnet Initial Br. to AirTouch at 21). Such an

approach does not satisfy the Commission's requirements as expressed in its 84-944 and 89-563 orders. Only through the maintenance of contemporaneous records of affiliated transactions could the Commission's intentions be met in order to ensure that discrimination did not occur with respect to transactions between AirTouch Cellular's wholesale affiliate and Cellnet when compared with transactions between AirTouch Cellular's wholesale and retail affiliates.

In addition, the records maintained by AirTouch Cellular were not premised on a transactional basis but rather were calculated on a monthly aggregate basis subsequent to the end of the year. By AirTouch Cellular's own admission, financial records were maintained on a consolidated basis for both retail and wholesale operations on a multi-state basis. At the end of each fiscal year, it creates an income statement that restates its financial transactions to show income and expenses attributable to just Ohio and to report wholesale and retail revenue and expenses separately (Tr. VI, 32; Tr. VII, 33; AirTouch Ex. 12, at 2). AirTouch Cellular acknowledges that it determines its affiliated charges after the fact (Tr. VI, 141). Such an approach does not comport with the Commission's stated desire to monitor that access to cellular wholesale service be provided pursuant to terms, conditions, and prices that are universally available on a nondiscriminatory basis to both affiliated and nonaffiliated retail arms. By not maintaining records of transactions as required by the Commission's directives in 89-563, the Commission is unable to monitor whether a cellular wholesale provider is properly accounting for transactions between itself and its affiliated retail arm. The potential for problems as a result of the failure to properly maintain records is no more apparent than AirTouch Cellular's own admission, as reflected in AirTouch Cellular Exhibit 12, at 15-22, that it did not include in its annual reports filed with the Commission, all of the minutes utilized by AirTouch Cellular's retail affiliate

for the years 1995-1997. Through the approach utilized by AirTouch Cellular, the Commission and resale customers are forced to wait over a year before being able to determine if AirTouch Cellular has complied with the Commission's directives relative to discrimination. Therefore, the Commission finds that for the time frame 1991-1997, AirTouch Cellular has not properly maintained accounting records as required by Commission directive.

Additionally, while the Commission recognizes that the 89-563 Finding and Order did not establish a specific requirement that wholesale providers and their retail affiliates maintain separate employees, contrary to the views expressed by AirTouch Cellular, the Commission maintained the requirement that the affiliated reseller have no involvement whatsoever in the wholesale operations of the underlying carrier. To this extent it is inappropriate for AirTouch Cellular's retail affiliate to have had access to specific wholesale information pertaining to Cellnet and its end user customers for the time frame of 1991-1994. Although some information may have been available via tariff, the record clearly establishes that communication of wholesale information was not independently obtained by AirTouch Cellular's retail affiliate but was directly provided by AirTouch Cellular's wholesale affiliate (Tr. IX, 50-54). There is no justifiable explanation for the sharing of this information (*Id.* at 66). Similarly, the Commission concludes that by allowing AirTouch Cellular's retail affiliate the ability to access AirTouch Cellular's wholesale switch in the 1991-1994 time frame, AirTouch Cellular's retail affiliate violated the requirement that the affiliated reseller have no involvement in the wholesale operations of the company (Tr. IV, 207).

As further evidence of the fact that AirTouch Cellular has violated the prohibition on AirTouch Cellular's retail affiliate having no involvement whatsoever in the operations of

AirTouch Cellular's wholesale affiliate, the Commission focuses on the admission of AirTouch Cellular, that, at least for the time frame 1991-1998, AirTouch Cellular's nonaffiliated wholesale rate was at least partially determined by concerns related to the affiliated retail arm (Tr. X, 88, 89, 125). Based on the aforementioned intentions of the Commission that there be no affiliated reseller involvement whatsoever in the wholesale operations, as well as the Commission's expectation that affiliated retail arms would truly purchase wholesale service just as nonaffiliated competitors, the potential impact on AirTouch Cellular's retail affiliate should not have been factored into the establishment of an nonaffiliated wholesale rate. Pursuant to the construct established in the 84-944 and 89-563 orders, affiliated and nonaffiliated wholesale customers were expected to independently purchase service and then pursue the necessary competitive business decisions at the retail level. Despite this fact, AirTouch Cellular's representatives in charge of pricing matters were unaware of any rate being charged to AirTouch Cellular's retail affiliate.

Therefore, consistent with the above analysis, the Commission finds that specified violations of the Commission's rules and orders have occurred relative to the designated time frames. To the extent that Cellnet's allegations are not specifically addressed by this discussion or elsewhere in this Opinion and Order, they are denied.

B. Count II — Ameritech Mobile and AirTouch Cellular Each Violated the Commission's Orders by Failing to Provide Cellnet With the Same Rates, Terms, and Conditions as its Affiliated Resellers.

1. Cellnet Relative to Ameritech Mobile (Count II)

Cellnet interprets the 84-944 and 89-563 orders to require that wholesale licensees provide cellular service pursuant to nondiscriminatory rates, terms, and conditions that are

universally available to both affiliated and nonaffiliated resellers. Cellnet opines that these orders do not require that nonaffiliated resellers be similarly situated to affiliated resellers in order to receive nondiscriminatory rates, terms, and conditions (Cellnet Reply Br. at 1, 2, 6). Cellnet believes that, rather than disputing the alleged violations of 84-944 and 89-563, Ameritech Mobile is attempting to relitigate the requirements established in the 84-944 and 89-563 orders (*Id.* at 10, 11).

Based on the testimony of the Ameritech Cellular's representatives regarding the company's general ledgers, Cellnet believes that the record demonstrates that Ameritech Mobile's wholesale affiliate never recognized or applied any rates for service provided to Ameritech Mobile's retail from 1993 to the present (Tr. II, 80; Tr. III, 15, 16, 32, 33, 57; Cellnet Initial Br. to Ameritech at 20-25; Cellnet Ex. 40). In contrast, Cellnet states that Ameritech Mobile's wholesale arm indicated that Cellnet would be obligated to pay specified rates for the following services: (1) airtime, (2) call forwarding, (3) access, (4) voice mail, (5) features, (6) roaming, (7) local toll, (8) directory assistance, and (9) $ .02/minute interconnection charge (Tr. I, 135, 136; Cellnet Initial Br. to Ameritech at 23, 28). Cellnet expresses the belief that it was not extended similar rates, terms, and conditions inasmuch as Ameritech Mobile's wholesale never charged Ameritech Mobile's retail from 1993 to 1998 for such services (Tr. III, 16-18; Cellnet Initial Br. to Ameritech at 25-30).

To further support its allegations of discrimination, Cellnet alleges that the rates offered to it by Ameritech Mobile wholesale in 1995 were identical to those available to Ameritech Mobile's corporate retail customers (Tr. I, 95-96, 124; Tr. II, 94). Therefore, Cellnet infers that Ameritech's internal wholesale rates must be lower in order for Ameritech Mobile's retail arm to continue to sell the service above cost

(Cellnet Initial Br. to Ameritech at 26). (This argument is also addressed in Count IX.)

To support its argument, Cellnet also relies on Section 4905.33, Revised Code, which requires that no public utility shall directly or indirectly charge an entity a greater or lesser amount for like and contemporaneous service under substantially the same circumstances and conditions, except as provided pursuant to Title 49, Revised Code. In this regard, Cellnet alleges that from 1993 to the present Ameritech Mobile's wholesale provided free service to Ameritech Mobile's retail while demanding payment from Cellnet for the same service. (This allegation is also addressed in Count IX.) Cellnet states that Ameritech Mobile's wholesale affiliate never established a wholesale rate for Ameritech Mobile's retail arm that was contingent upon volume, circumstance, or other conditions. Cellnet concludes that Ameritech Mobile's wholesale provided free service to Ameritech Mobile's retail, in violation of Section 4905.33 (*Id.* at 31, 32). Even if a wholesale rate existed that was contingent upon factors such as volume, Cellnet purports that such a pricing structure would be improper to the extent that it would restrict resale (Cellnet Reply Br. to Ameritech at 7).

Consistent with the Ohio Supreme Court's holding in *Jones v. VIP Development Co.*, 15 Ohio St.3d 90, 93 (1984) and the Commission's holding in its August 31, 1995 Finding and Order in Case No. 93-1408-EL-CSS, *In the Matter of Youngstown Thermal Limited Partnership v. Ohio Edison Co.*, Cellnet believes that it has successfully demonstrated that Ameritech Mobile wholesale has further violated Section 4905.33, Revised Code, by engaging in below cost pricing to its retail affiliate, for the purpose of destroying competition (Cellnet Initial Br. to Ameritech at 31-36).

As a final demonstration with respect to this count, Cellnet alleges that Ameritech Mobile's discriminatory wholesale pricing policies, as described above, violate Section 4905.35, Revised Code, which prohibit a public utility from giving any undue or unreasonable preference or advantage to any entity. Cellnet asserts that Ameritech Mobile's pricing policies are unreasonable because (1) they violate the 84-944 orders, (2) they effectively limit cellular resale, and (3) they are intended to unlawfully protect Ameritech Mobile's retail operations and destroy competition (*Id.* at 36, 37).

2. Ameritech Mobile Response (Count II)

With respect to the claim of discrimination, Ameritech Mobile finds Cellnet's arguments to be flawed due to the fact that Cellnet fails to recognize that Ameritech Mobile's retail operation is the largest and most tenured customer of Ameritech Mobile's wholesale. Ameritech Mobile asserts that differences in prices, terms, and conditions based on these factors is permissible inasmuch as not all resellers are similarly situated to Ameritech Mobile's retail (Ameritech Initial Br. at 3, 4). Ameritech Mobile advocates that distinctive treatment based on volume, term, contract exclusivity, and creditworthiness is reasonable and proper (Ameritech Reply Br. at 12, 13). In support of its belief Ameritech Mobile relies on the Commission's January 14, 1999, Opinion and Order in Case No. 97-876-EL-CSS, *In the Matter of The Complaint of Mark Weiss v. The Cleveland Electric Illuminating Company.* Pursuant to this decision Ameritech Mobile believes that differential pricing, based upon reasonable and necessary business considerations, is appropriate (Ameritech Initial Br. at 48).

In support of this argument, Ameritech Mobile focuses on the language referenced in the Commission's December 22, 1993, Entry on Rehearing in 89-563, Appendix A at 15.

Specifically, Ameritech Mobile submits that the requirement that services purchased by the affiliated reseller must be at rates and terms no more favorable than those made available to nonaffiliated providers is limited to nonaffiliated providers of functionally similar services or equipment (Ameritech Reply Br. at 12).

In addition, Ameritech Mobile argues that there is no legal requirement that, in all cases, Cellnet, as a wholesale customer, is entitled to a lower rate than that offered to any retail customer (Ameritech Initial Br. at 4). Ameritech Mobile views Cellnet's complaint as an endeavor to pursue a private interest that is void of any consideration of what is in the public interest (Ameritech Reply Br. at 1).

Ameritech Mobile disputes Cellnet's allegations that its internal wholesale rate for cellular service is zero. Although no rate exists on Ameritech Mobile's books relative to intracompany transactions, Ameritech Mobile opines that this does not signify that the internal rate is zero. Ameritech Mobile submits that the Commission's orders do not require that an internal wholesale rate be developed or that it be used to record any intracompany transaction (*Id.* at 20, 21). Further, the respondent asserts that since the implementation of the Omnibus Budget Reconciliation Act of 1993 (Budget Act),[62] the Commission has been preempted from establishing an internal intracompany rate or dictating the manner in which a wholesale rate should be developed (*Id.*). In addition, citing to *Cellular Resale Policies*, 6 FCC Rcd 1719, 1724-1726 (1991), Ameritech Mobile states that there is no requirement that a cellular carrier establish a wholesale rate or provide any specific discount to resellers from retail rates (*Id.* at 23).

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[62] Codified in principal part at 47 U.S.C. 332.

In response to Cellnet's claims that Ameritech Mobile's wholesale engaged in discrimination by offering Cellnet service pursuant to rates, terms, and conditions different from that provided by Ameritech Mobile's retail, Ameritech Mobile contends that such arguments ignore competitive reality and are contrary to the public interest (Ameritech Initial Br. at 15). Based on the testimony of Dr. Roger Blackwell, *supra*, Ameritech Mobile advocates that companies be allowed to meet the needs of their customers in a competitive and dynamic environment, despite the fact that this may result in some customers being treated differently (*Id.* at 16).

Ameritech Mobile rejects Cellnet's arguments with respect to Sections 4905.33 and 4905.35, Revised Code. First, Ameritech Mobile interprets Sections 4905.33 and 4905.35, Revised Code, to require that the customer of the public utility be a "person, firm, or corporation." Ameritech Mobile does not believe that the statutes contemplate consideration of internal transactions within the public utility itself. Inasmuch as Ameritech Mobile's retail is not a "person, firm, or corporation" separate and apart from the wholesale operations, Ameritech Mobile contends that Section 4905.33, Revised Code, is not applicable (Ameritech Reply Br. at 27, 28). Ameritech Mobile also emphasizes that Section 4905.33, Revised Code, is not applicable inasmuch as Cellnet has failed to demonstrate that Ameritech Mobile's retail and Cellnet are both purchasing a "like and contemporaneous service under substantially the same circumstances and conditions" as required by statute (*Id.* at 28).

Similarly, Ameritech Mobile concludes that there has been no violation of Section 4905.35, Revised Code. In reaching this conclusion, Ameritech Mobile remarks that Cellnet has failed to establish the conditions of "unreasonable preference or advantage" and "undue or unreasonable prejudice or disadvantage," as required by Section 4905.35, Revised Code

(*Id.* at 32, 33). Ameritech Mobile asserts that there are substantial differences to establish that Ameritech Mobile and Cellnet do not operate under substantially similar circumstances and conditions (*Id.* at 28-30, 33). Further, Ameritech Mobile denies that it has attempted to destroy competition. In this regard, Ameritech Mobile points to the fact that, since 1990, it has maintained a substantial base of resellers, for which Ameritech Mobile's wholesale has attempted to maintain a sufficient margin to allow them to operate (*Id.* at 30).

In response to Cellnet's allegations that Ameritech Mobile's wholesale treatment of resellers will impair the entrance of new carriers to the market, Ameritech Mobile describes how the number of facilities-based providers has increased as a result of new licensees and the fact that there is thriving group of resellers in Ohio competing under the same terms and conditions as offered to Cellnet (*Id.* at 8, 14, 24). Ameritech Mobile asserts that only good resellers will survive by finding their market niche based on something other than price (*Id.* at 14, 15).

(a) Ruling: Count II — Allegations Relative to Ameritech Mobile

Although Ameritech Mobile chooses to justify its conduct under the guise of competitive response, the Commission notes that the cellular-related provisions of the 84-944 Opinion and Order signified the guiding Commission policy from April 9, 1985, until the issuance of the 89-563 provisions on October 22, 1993. The 89-563 requirements relative to cellular providers remained in effect until the recent issuance of the 97-1700 Finding and Order in December 1999. Therefore, regardless of Ameritech Mobile's opinion as to the state of the competition in the cellular industry, the then-existing regulations were applicable until further ordered by the Commission. Similarly, the number of Ameritech resellers operating in Ohio has no

direct bearing with respect to the Commission's consideration of the allegations raised in this count of the complaint. The relevant analysis requires a determination as to whether Ameritech Mobile engaged in discriminatory conduct against Cellnet. In order to perform this analysis, the Commission must review the transactions between Ameritech Mobile's wholesale arm and its retail affiliate. As established pursuant to the 84-944 and 89-563 orders, this determination is to be guided by the maintenance of the appropriate affiliated transaction records, and not the absence or existence of competition in the cellular resale market.

The Commission recognizes that up until October 22, 1993, Ameritech Mobile's wholesale had tariffs in effect that allowed for volume discounts based on the volume usage of a particular provider. Therefore, the Commission is cognizant of the potential for a difference in the ultimate rates charged to affiliated and nonaffiliated customers, provided capacity was offered on a nondiscriminatory basis and the affiliated retail arm could establish that it satisfied the associated terms and conditions. As stated above in our discussion relative to Count I, Ameritech Mobile has failed to appropriately maintain records that would assist the Commission in potentially ruling in its favor with respect to this count. Specifically, there is no evidence to demonstrate that Ameritech Mobile retail purchased service at tariffed rates under the same terms and conditions as nonaffiliated resellers. Indeed, there is no evidence of any kind that Ameritech Mobile's retail arm paid anything to is wholesale affiliate for wholesale cellular service. The Commission, in its 89-563 Finding and Order, specifically directed Ameritech Mobile to maintain the appropriate records. Such records could be utilized as a vehicle to demonstrate a reasonable basis for different treatment between a nonaffiliated reseller such as Cellnet, and Ameritech Mobile's retail affiliate

through the maintaining of transaction records. No such records were produced at the time of hearing.

In addition to Ameritech Mobile's failure to present any records relative to its internal rates or volume of usage, the record clearly demonstrates that Cellnet was treated less favorably, at least in some cases, than Ameritech Mobile's retail arm and, in some cases, retail customers (e.g., Tr. I, 121-135; Tr. II, 35-47). In reaching this determination, the Commission recognizes that many of the examples cited by Cellnet involve scenarios wherel y Cellnet as a wholesale customer of approximately 15,000 lines was at least equal size or larger than the retail customer targeted by Ameritech Mobile's retail. Specific to this point, the Commission points to the comparisons provided relative to the terms, and conditions offered to Cellnet and those extended by Ameritech Mobile retail as reflected, for example in Cellnet Exhibits 6, 13, 16, and 17 (Tr. I, 115-117, 125, 128).[63] In addition, the Commission considers the comparison between the rates offered to Cellnet to the rates, terms, and conditions reflected in Cellnet Exhibits 35, 36, 37, 38, and 39.[64] These differences exist despite the fact that the Commission's 84-944 and 89-563 orders required that cellular licensees provide access pursuant to terms, conditions, and prices that are universally available on a nondiscriminatory basis (84-944 Opinion and Order at 10; 89-563 Finding and Order at 22).

Fundamentally, Ameritech Mobile's retail arm could not be purchasing service from Ameritech Mobile's wholesale affiliate

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[63] The Commission is limiting its consideration, as discussed *infra*, to the 1995-1998 time frame.

[64] While the Commission notes that significant testimony was presented relative to the appropriateness of applying the Franklin County plan to Lane Aviation, the Commission can make its determination relative to the allegations of discrimination without having to specifically decide this issue.

at the same prices as nonaffiliated resellers and then selling it to retail customers at the same rate as the purchase price. If an additional volume discount was being applied to the price at which Ameritech Mobile's retail arm was purchasing service, this should have been properly recorded pursuant to the terms and conditions delineated by the directives in 89-563 in order to allow for an appropriate determination of the reasonable application of those discounts consistent with the terms and conditions of the pricing plans. Only through such a structured process could the Commission be assured that the opportunity for resale, as discussed in the 89-563 Opinion and Order, be achieved. Ameritech Mobile has neither explained its failure to maintain the appropriate records nor provided any other justifiable explanation for the disparity in Ameritech Mobile's retail price when compared to the wholesale price charged to Cellnet.

Additionally, the Commission relies on the testimony of Mr. Alan Ferber who acknowledged that, currently, there is no rate between Ameritech Mobile's wholesale and Ameritech Mobile's retail affiliates, but, if such a rate did exist, it would be lower than that allowed pursuant to the various pricing matrices presented at hearing (Tr. II, 85, 103-106). The Commission notes that the record was void of any evidence that Ameritech Mobile's retail affiliate was charged specific rates based on the pertinent pricing matrices (i.e., Tr. II, 105, 106; Tr. III, 33; Cellnet Ex. 4, 5; Ameritech Ex. 8;). Rather, Mr. Ferber recognized that, if Ameritech Mobile's retail was actually charged for service pursuant to these pricing matrices, he would probably add an additional pricing tier (Tr. II, 106).

Therefore, based on the record in this case, the Commission must conclude that from 1995 through 1998, Ameritech Mobile has violated the Commission's requirement relative to nondiscriminatory treatment of nonaffiliated wholesale customers by either not substantiating the more favorable

treatment afforded its retail affiliate or by not substantiating that its retail affiliate paid anything at all to Ameritech Mobile's wholesale for its cellular service. Specific to this point, the Commission notes that Mr. Ferber acknowledged that that he does not know the rate between Ameritech Mobile's wholesale and Ameritech Mobile's retail because it does not exist, or if it does exist, he is unaware of it (Tr. II, 80, 81). As further support for the belief that Ameritech Mobile wholesale has not charged Ameritech Mobile retail for service, the Commission notes that Ameritech Mobile admitted that its only attempt to determine its internal affiliated charges, which was performed in 1993, proved to be unsuccessful (Tr. III, 18, 19). In addition, if an internal wholesale rate had been charged to Ameritech Mobile's retail, it would have been taken into account for the purpose of establishing Ameritech Mobile's retail rates. Despite this fact, Ameritech Mobile admitted that it could not identify this cost at the time of hearing (Tr. III, 38-40).

Similarly, the Commission reaches a like determination relative to the allegations pertaining to Ameritech Mobile's violation of the provisions of Section 4905.35, Revised Code. Section 4905.35, Revised Code, provides that "no public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage." Due to Ameritech Mobile's failure to develop rates for transactions between its wholesale and retail affiliates, as well as the failure to properly maintain its records as directed by the Commission, Ameritech Mobile has harmed its own defense by not even allowing the Commission to be aware of the actual rate charged to its retail affiliate. Ameritech Mobile wishes the Commission to blindly accept the reasonableness of its internal rate without first establishing that a specific rate existed or establishing that the

rate is greater than zero. In the absence of any information to the contrary, the Commission must assume that Ameritech Mobile's internal wholesale rate is zero. This conclusion is supported by Ameritech Mobile's own inability to identify any rate, as well as the fact that Ameritech Mobile's own annual report filings fail to demonstrate any revenue for its affiliate retail arm's purchase of service. Therefore, the Commission concludes that Ameritech Mobile's retail has violated Section 4905.35, Revised Code, for the 1995-1998 time frame.

Relative to Cellnet's allegations pertaining to Section 4905.33, Revised Code, the pertinent statute requires that:

> No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions. No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

The Commission concludes that Ameritech Mobile has violated Section 4905.33, Revised Code, by charging Cellnet a higher rate for doing a like and contemporaneous service under substantially the same circumstances and conditions. As explained above, in the absence of records reflecting Ameritech Mobile's internal rate under which Ameritech Mobile's retail receives service, Ameritech Mobile is simply requesting the Commission to trust it based on its self-serving arguments for any disparity in the treatment between Ameritech Mobile's retail and Cellnet.

Consistent with our earlier holding above and based on the record in this case, it is apparent that Ameritech Mobile's wholesale is charging Cellnet a higher rate for service than it is charging Ameritech Mobile's retail. More to the point, in the absence of any evidence of a charge being made by Ameritech Mobile's wholesale to Ameritech Mobile's retail, the Commission finds that there was no charge between Ameritech Mobile's retail and Ameritech Mobile's wholesale. Both Cellnet and Ameritech Mobile's retail are wholesale customers of Ameritech Mobile's wholesale. In the absence of a proper demonstration of the basis for the disparity in treatment, the Commission must find in Cellnet's favor relative to the these specific allegations for the pertinent time frame as discussed above.

The Commission notes that all of the illustrative examples provided at hearing pertain to the 1995-1998 time frame. With respect to Cellnet's allegations that Ameritech Mobile denied service to Cellnet from 1993-1995, the Commission finds that both Cellnet and Ameritech Mobile appear to agree that the first real discussions regarding specific terms and conditions of service did not occur until sometime in 1995. Although Cellnet believes that Ameritech Mobile's failure to tender a resale offer during 1993-1995 signifies statutory violations, the Commission concludes, and the record reflects, that Cellnet did not initially formally pursue the opportunity to serve in a reseller capacity but, rather, at best, its efforts equated to the level of an informal inquiry regarding the possibility of becoming a reseller (Tr. I, 60, 83). To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and Order, they are denied.

3. Cellnet Relative to AirTouch Cellular (Count II)

Cellnet interprets the 84-944 and 89-563 orders to require that, in providing service to both affiliated and nonaffiliated

resellers, wholesale cellular carriers must provide service to nonaffiliated resellers under terms and conditions which are no less favorable than the terms and conditions which they offer their own affiliated retail operations.[65] Cellnet contends that the practical benefit of this requirement is impaired due to the inability of a nonaffiliated reseller from ever learning the wholesale rate charged to the affiliated reseller or what the rate entails (Cellnet Initial Br. to AirTouch at 23, 24). In support of this argument, Cellnet points to the acknowledgement of Mr. Minardo[66] that he was unaware of a scenario whereby AirTouch Cellular wholesale sold service to AirTouch Cellular retail and, therefore, could not identify the rate at which AirTouch Cellular's affiliated retail arm purchased service (Tr. XII, 106, 107; Cellnet Initial Br. to AirTouch at 24, 25).

Despite the fact that Cellnet may have been provided the same rates, terms, and conditions as provided to other nonaffiliated resellers, Cellnet objects to paying any rate for its service which is different from that which is charged to AirTouch Cellular's affiliated retail arm (*Id.* at 26). It is Cellnet's contention that, although AirTouch Cellular may have theoretically charged itself pursuant to similar rate plans, the actual resulting charges were not the same due to the conduct alleged in the complaint (Cellnet Reply Br. to AirTouch at 18). For the purpose of analyzing the allegations of this count relative to the 84-944 and 89-563 orders, Cellnet avers that these orders do not require a finding of unreasonable discrimination but, rather, simply that the prices charged to Cellnet are not the same as AirTouch Cellular's affiliated retail arm. Cellnet insists that AirTouch Cellular was fully aware of

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[65] Cellnet also identifies Sections 4905.33 and 4905.35, Revised Code, in support of its discrimination claims (Cellnet Initial Br. at 77).

[66] As described above, Mr. Minardo is the regional director responsible for AirTouch Cellular's resale of service to nonaffiliated retailers, agents, and resellers.

the effect of its conduct on Cellnet, and even if it did not, lack of intent is not an affirmative defense (*Id.* at 19, 20).

In order to further substantiate its claim of the disparity in the treatment afforded nonaffiliated resellers, Cellnet alleges that from 1991 to the present, AirTouch Cellular wholesale did not charge AirTouch Cellular retail for 100 percent of the minutes used but did charge Cellnet for 100 percent of its minutes.

In support of this allegation, Cellnet alleges that the accounting contained in Cellnet Exhibit 103 demonstrates that AirTouch Cellular wholesale has discounted the airtime charges charged to AirTouch Cellular retail by as much as 50 percent, for both peak and off-peak minutes, as a result of understating the number of minutes charged to AirTouch Cellular's retail affiliate. This understatement was due to the fact that, while AirTouch Cellular's wholesale affiliate charged Cellnet for all calls regardless of where the call originated or terminated, AirTouch Cellular's wholesale arm only charged its retail affiliate for calls which originated and terminated in Ohio. Thus, Cellnet alleges that, for every month prior to 1997, in every Ohio market, AirTouch Cellular wholesale only charged its retail affiliate for a fraction of the airtime that it actually used (Cellnet Initial Br. to AirTouch at 27-31). Cellnet believes that these allegations are supported by the fact that AirTouch Cellular itself recognized the inequity of its accounting, thus prompting the preparation of restated accounting in 1998 for the time period 1995-1997. Cellnet opines that the original accounting best reflects the actual practices of AirTouch Cellular wholesale at the specific time frames addressed in this complaint (*Id.* at 33-36, 75, 76).

Cellnet also alleges that, in 1995-1997, AirTouch Cellular wholesale failed to charge its retail affiliate for free minutes that were given away as part of a promotion (promotional

minutes), given away to match a deal or appease a customer (concession minutes), or included as part of a retail rate plan (allowance minutes) (*Id.* at 37). Due to the failure of AirTouch Cellular to include these minutes in its original accounting as reflected in the original 1995-1997 PUCO Annual Reports, AirTouch Cellular subsequently restated its accounting using all minutes (*Id.* at 37-39, 56). It is Cellnet's belief that the restated accounting demonstrates that in 1995-1997, AirTouch Cellular retail received a substantial number of free promotional, concession, and allowance minutes (*Id.* at 40, 64; Cellnet Reply Br. to AirTouch at 24).[67] Although no restatements were performed for 1991-1994, Cellnet states that similar accounting errors existed for these years (Cellnet Reply Br. to AirTouch at 24). As such, Cellnet argues that AirTouch Cellular violated the 89-563 Order by charging Cellnet for all of Cellnet's minutes while not doing so for its affiliated retail arm (Cellnet Initial Br. to AirTouch at 41).

For 1994, Cellnet alleges that, although AirTouch Cellular wholesale charged Cellnet for all minutes used in the Cincinnati market, AirTouch Cellular wholesale did not account for any charges to AirTouch Cellular retail for the same time period. As a result, the retail costs allocated to AirTouch Cellular retail were understated, thus, resulting in an overstatement of AirTouch Cellular's retail net income figure for 1994 (*Id.* at 69, 70).

For all years from 1991-1997, Cellnet alleges that AirTouch Cellular has discriminated against Cellnet in favor of its own affiliated retail operations by charging Cellnet a higher rate for functionally equivalent airtime and identical airtime, in violation of the 84-944 and 89-563 orders.

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[67] With respect to 1991-1994, Cellnet alleges that AirTouch Cellular did not keep records which would have allowed Cellnet to determine the value of these minutes (Cellnet Initial Br. to AirTouch at 41).

Specifically, Cellnet draws attention to the fact that, for the time frame November 1996 through at least December 1997, AirTouch Cellular wholesale provided service to AirTouch Cellular retail pursuant to the "Reseller Exclusive II" rate plan. In accordance with this rate plan, a reseller supposedly received a lower rate as consideration for agreeing to exclusively sell AirTouch Cellular's wholesale service (*Id.* at 42). Cellnet asserts that, while, as of April 1997, the "Reseller Exclusive II" rate plan ceased being available to nonaffiliated resellers, AirTouch Cellular retail continued to receive service pursuant to the plan. Additionally, Cellnet questions whether the "Reseller Exclusive II" rate plan on its face was a violation of the 89-563 Order by restricting resale by nonaffiliated entities (*Id.* at 42, 43; Cellnet Reply Br. to AirTouch at 18).

Cellnet alleges that AirTouch Cellular wholesale discriminated against Cellnet from November 1997 to March 1998 by refusing to provide Cellnet with digital service at digital rates, while at the same time providing its retail affiliate with digital service at digital rates. Cellnet represents that, during this time frame, it was only able to purchase digital service at analog rates. These charges were double the digital rate provided to AirTouch Cellular retail (Cellnet Initial Br. to AirTouch at 45).

As a culmination of the volume discounts, free promotions, concession, and allowance minutes, Cellnet alleges that AirTouch Cellular wholesale charged its retail affiliate considerably less for the per minute rate and recurring charge than it charged Cellnet for 1991-1997. In support of this contention, Cellnet relies on the testimony of its expert witness Robert Ferguson, as depicted in Cellnet Exhibit 188 (*Id.* at 48, 49, 54, 55, 62, 63, 66, 71, 72).

In addition to concession minutes, Cellnet concludes that AirTouch Cellular has also utilized other concessions as a

further method of discrimination. Some of these concessions were supposedly provided to AirTouch Cellular's retail operations, while not being afforded to nonaffiliated resellers such as Cellnet. Concessions in this context are defined as items of value that AirTouch Cellular offers in addition to any promotion or standard rate plan in order to obtain or retain business. These additional concessions include:

(1) one time credits of amounts deducted from a customer's account;

(2) waiver of charges;

(3) installation of equipment; and

(4) equipment itself (Cellnet Initial Br. at 53; Cellnet Reply Br. at 14).

Cellnet believes that, consistent with the aforementioned *Youngstown Thermal* decision, these compensatory factors should be considered when looking at the issue of discriminatory treatment (*Id.* at 14).

With respect to the recurring charge, while Cellnet acknowledges that there is a difference of opinion as to whether directories or the number of subscribers should be utilized for the purpose of calculating the monthly recurring charge revenues, regardless of which method is utilized, Cellnet expresses the opinion that the resulting recurring charge assessed to AirTouch Cellular retail is either the same or, in most cases, lower than that charged to Cellnet during 1994-1997 (Cellnet Initial Br. to AirTouch at 49-56, 63, 64, 68).

Cellnet contends that, while it was billed a toll charge by AirTouch Cellular wholesale for all long distance service used by Cellnet's end users in 1991-1997, AirTouch Cellular wholesale did not charge its retail affiliate any amount for toll

services utilized by its end users (*Id.* at 51, 52, 56, 65, 70, 72, 74).

Similarly, Cellnet asserts that it was billed a charge by AirTouch Cellular wholesale in order to reserve a block of telephone numbers which could be assigned as needed. By comparison, Cellnet insists that AirTouch Cellular wholesale did not similarly charge AirTouch Cellular retail to reserve number blocks (*Id.* at 52, 56, 65, 70, 72, 74).

(a) Retroactive Tiered Rate Plan versus Nonretroactive Tiered Rate Plan

In 1995, in addition to receiving free promotional, concession, allowance, and uncharged minutes, Cellnet alleges that AirTouch Cellular retail was provided service pursuant to a more favorable retroactive rate structure which combined the usage of all of AirTouch Cellular's retail customers for the purpose of determining the appropriate rate tier for all of its wholesale charges. This is in contrast to the less favorable, nonretroactive rate structure applied to Cellnet which priced minute usage on an individual Cellnet account basis for the purpose of determining the appropriate rate tier for its wholesale charges. The application of the nonretroactive pricing structure applied to Cellnet resulted in a higher per minute usage rate for Cellnet in the Akron, Canton, Cincinnati, Cleveland, Columbus, and Dayton markets in 1995 (*Id.* at 58-62).

(b) Directory Assistance

Cellnet contends that for 1991-1995, Cellnet was billed by AirTouch Cellular wholesale each time one of its customers utilized directory assistance, AirTouch Cellular wholesale did not charge its affiliated retail arm for its customers usage during the same time period (*Id.* at 65, 70, 72, 74). By providing directory assistance in these years to AirTouch

Cellular retail at no charge, while charging Cellnet for the same service, Cellnet submits that AirTouch Cellular has violated the 89-563 Order.

(c) Forwarding/Transfer Fees

Cellnet alleges that, in 1994, it was billed by AirTouch Cellular wholesale for network minutes used when a call is transferred from a cellular line to landline number ("forwarding/transfer fees"), but AirTouch Cellular retail was not similarly charged for such usage (*Id.* at 70).

(d) Sections 4905.33 and 4905.35

Cellnet submits that, as a result of AirTouch Cellular's wholesale offering of service to AirTouch Cellular retail pursuant to the preferential rates and conditions described above, it has violated the prohibition stated in Section 4905.33, Revised Code, that no public utility receive greater or lesser compensation for the services rendered than it receives from any other entity for an identical service (*Id.* at 78).

Cellnet also purports that, based on the conduct described above, AirTouch Cellular wholesale has violated the prohibition stated in Section 4905.33, Revised Code, that no public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition (*Id.* at 77). Cellnet argues that, based on the rationale stated in the Commission's decision in *Youngstown Thermal*, it is apparent that AirTouch Cellular wholesale engaged in discriminatory and anti-competitive conduct for the purpose of destroying cellular retail competition. In support of its arguments, Cellnet relies on Cellnet Exhibit 210 in which AirTouch Cellular identified nonaffiliated resellers such as Cellnet as "foes" (*Id.* at 79-82).

Finally, based the allegations summarized above, Cellnet asserts that AirTouch Cellular has violated the provisions of

Section 4905.35, Revised Code, by providing undue or unreasonable preference to AirTouch Cellular retail through the charging of rates lower than those charged to Cellnet (*Id.* at 87).

(e) Toll

Cellnet alleges that, while in 1991-1997, Cellnet was billed a toll charge by AirTouch Cellular's wholesale affiliate for all long distance service used by Cellnet's end users, AirTouch Cellular failed to charge its affiliated retail arm for similar services (*Id.* at 51, 52, 65, 70, 72, 74; Cellnet Ex. 219).

4. AirTouch Cellular Response (Count II)

AirTouch Cellular opines that, with respect to Cellnet's allegations and arguments relative to Count II, the Commission is preempted from regulating the rate that is charged by AirTouch Cellular wholesale to AirTouch Cellular retail. AirTouch Cellular also submits that the Commission's prior orders (84-944 and 89-563) did not require AirTouch Cellular to have an affiliated reseller, and, therefore, could not have required that it specify the rate charged between AirTouch Cellular wholesale and AirTouch Cellular retail. It remarks that, pursuant to the 84-944 and 89-563 orders, the only potential consequence for failing to sell service to an affiliated reseller at the rates available to a nonaffiliated provider is for the cellular provider's retail operations to fall within the definition of a "telephone company" (AirTouch Initial Br. at 15). Alternatively, AirTouch Cellular believes that Count II of Cellnet's complaint pertaining to claims of discriminatory conduct should be denied based on the record's testimony that the rates charged to Cellnet were pursuant to the "standard AirTouch Cellular reseller rates" (AirTouch Reply Br. at 16).

AirTouch Cellular identifies the fact that, in constructing its Ohio-specific wholesale and retail accounting each year for the purpose of "selling" itself service, AirTouch Cellular used only

the available reseller rates and did not create special rates just for itself. According to AirTouch Cellular, there has never been any intent or design on behalf of AirTouch Cellular in presenting its wholesale/retail accounting to "sell" itself service at any rate other than the rates specified in its wholesale tariff of generally available reseller rate plans (AirTouch Initial Br. at 28). To illustrate this point, AirTouch Cellular states that in 1993 and 1994 it sold itself service based on the access charges and airtime rates specified in its wholesale tariff filed with the Commission. In 1995, AirTouch Cellular alleges that it sold itself service using the access charges and airtime rates specified in the reseller advantage rate plan for January through May and those specified in the reseller choice plan for the remainder of the year. In 1996, AirTouch Cellular sold itself service using the access charges and airtime rates specified in the most advantageous rate available in each market in each month. In 1997, AirTouch Cellular sold itself service using access charges and airtime rates specified in the "Reseller Exclusive Rate Plan" for most markets and the "Wholesale Account Pricing 2 Plan" in others (*Id.* at 28). AirTouch Cellular contends that the reseller exclusive plans were available, but not mandatory, for resellers in 1996 and 1997 (for those that elected the pricing plans prior to April 1997) (AirTouch Reply Br. at 20).

AirTouch Cellular rejects the wholesale pricing methodology proposed by Cellnet. Specifically, it does not believe that cellular carriers are required to first determine the wholesale price to be charged and then calculate the applicable retail cost. Rather, AirTouch Cellular contends that it first focuses on the retail market price. This analysis includes determining the demands of the competitive market. The determination of a retail price also includes its costs (including technical costs). Once the retail price is established, AirTouch

Cellular then goes back and adjusts its wholesale price accordingly (AirTouch Initial Br. at 26, 27).

Prior to the setting of its retail prices, the company compares the proposed rates to the existing wholesale rates. This comparison is done in order to ensure that the margin between wholesale and retail pricing is maintained (*Id.* at 21). In support of this principle, AirTouch Cellular refers to the testimony of Diane Koskey, its pricing manager from 1994-1996, who described the manner in which this comparison was performed (Tr. X, 40; AirTouch Initial Br. at 23). Following 1996, AirTouch Cellular did not perform as detailed an analysis inasmuch as resellers could then purchase service pursuant to the same terms and conditions as retail customers (*Id.* at 23).

AirTouch Cellular insists that there is no evidence that it was pricing its service below cost in the manner contemplated in the *Youngstown Thermal* decision. AirTouch Cellular denies that there is any evidence that it ever acted with the intent to destroy Cellnet as a competitor or to harm resellers in general. Additionally, AirTouch Cellular contends that, unlike the electric industry addressed in *Youngstown Thermal*, the cellular industry is a competitive industry in which there is little risk that consumers will be denied access to a product (*Id.* at 29).

AirTouch Cellular represents that its accounting decisions which were made in good faith and were based on reasonable interpretations in the absence of any guidance provided by the Commission. While it acknowledges that accounting decisions may have ultimately been determined to be incorrect, it is AirTouch Cellular's viewpoint that none of the conduct alleged by Cellnet equates to unreasonable discrimination as prohibited by statute (AirTouch Initial Br. at 29, 30; AirTouch Reply Br. at 17, 28, 30, 31). Further, AirTouch Cellular emphasizes that it has corrected the alleged accounting errors through its restated wholesale/retail income statements for 1995-1997 (*Id.*

at 18). Relative to the issue of whether directories or subscribers should have been used for the calculation of access charges, AirTouch Cellular relies on the testimony of Ms. Martin for support of the calculation based on directories (*Id.* at 22).

(a) Reseller Exclusive II Rates

AirTouch Cellular asserts that Cellnet's argument that AirTouch Cellular improperly used the Reseller Exclusive II Rate Plan in its accounting for late 1996 through 1997 is not well taken. As evidence of the viability of this rate plan, AirTouch Cellular references the fact that resellers in Michigan availed themselves of the program. AirTouch Cellular attributes any harm that may have been incurred by Cellnet to the fact that Cellnet chose not to participate in the plan. AirTouch Cellular asserts that the FCC has never determined that an optional exclusive reseller rate plan should be prohibited (*Id.* at 19, 20).

(b) Allowance, Promotional, and Concession Minutes

AirTouch Cellular rejects Cellnet's allegations that it did not charge its retail operations for allowance, promotional, or concession minutes. Rather, it believes that the restated accounting for 1995-1997, addressed the concern that all allowance, promotional, and concession minutes were picked up and charged to retail (AirTouch Initial Br. at 33; AirTouch Reply Br. at 26).

(c) Number Reserve Charges

As justification for its failure to charge itself for the reserving of telephone numbers, AirTouch Cellular explains that no charge was required since reseller contracts as of August 1995 allowed resellers to order blocks of numbers in quantities as small as ten. Therefore, AirTouch Cellular did not

believe that reserve charges would apply unless telephone numbers were held beyond a specified period of time, as was the case with Cellnet (*Id.* at 25).

(d) Toll

AirTouch Cellular believes that it is appropriate to exclude toll charges from the Commission's wholesale tax calculation since it is an optional service for resellers. It does agree, however, that, for consistency sake, the toll expenses should not have been allocated as a wholesale expense but instead should have been treated as a retail expense (AirTouch Reply Br. at 25).

(e) Directory Assistance

AirTouch Cellular states that it was reasonable for AirTouch Cellular wholesale to not charge AirTouch Cellular retail for directory assistance since, prior to 1996, it was not provided by AirTouch Cellular's wholesale affiliate (*Id.* at 26).

(f) Digital

In regard to Cellnet's claims that AirTouch Cellular did not offer wholesale pricing for digital service contemporaneously with its introduction of digital service in November 1997, AirTouch Cellular insists that this delay was justified in order to timely respond to the entrance of personal communication service (PCS) providers in the Ohio market, compounded by the need to appropriately determine the level of wholesale discount in light of the pricing plans utilized by PCS providers (AirTouch Initial Br. at 25, 26).

Finally, while AirTouch Cellular acknowledges that, for 1995, it may have charged its affiliated retail arm pursuant to a retroactive rate plan and nonaffiliated resellers on a nonretroactive basis, it asserts that this distinction was justified, and not a violation of Section 4905.33, Revised Code, due to

the fact that the affiliated and nonaffiliated resellers are not similarly situated (*Id.* at 30).

(i) Ruling: Count II — Allegations Relative to AirTouch Cellular

The Commission has previously clarified that its prohibition on discrimination stands for the principle that wholesale cellular providers must offer services at rates, terms, and conditions that are no more favorable than those which it makes available to any nonaffiliated providers of functionally similar services or equipment (89-563 Finding and Order, Appendix A at 15). The Commission notes that this language is similar to language stated in Section 4905.33, Revised Code. Despite Cellnet's arguments to the contrary, the Commission believes that the actual rates applied to wholesale customers can differ provided that the wholesale provider can establish that the applicable terms and conditions of an established rate plan are applied in a consistent manner and that the wholesale provider has maintained the appropriate records to substantiate that all wholesale customers have purchased service in accordance with the applicable terms and conditions. Upon satisfying these requirements, it is feasible that the resulting rate charged to wholesale customers may differ, inasmuch as the wholesale customers may not be receiving functionally similar services or equipment. The Commission will ultimately determine the reasonableness of any distinction relative to the rates, terms, or conditions of service offered. As described below, the Commission finds that, with respect to many of the alleged distinctions in treatment between the affiliated retail arm and the nonaffiliated retail arm, the explanations provided are not sufficient to justify the apparent disparity.

The Commission notes that on September 22, 1998, AirTouch Cellular notified the Commission of a correction to AirTouch Cellular's operating and miscellaneous revenue for

the years ending December 31, 1995-1997. Through its notification, AirTouch Cellular admitted that its previously reported wholesale revenue for these years did not include rate-plan-included minutes or promotional minutes that were rated at zero to its retail affiliate's end users. As a result, there was substantial understatement of wholesale revenues for the respective years reported. Specifically the understatements were as follows: $ 9,277,000 (1995), $ 16,996,000 (1996), and $ 27,272,000 (1997) (AirTouch Ex. 12 at Sub Ex. 3). AirTouch Cellular represented that the restatements included a number of modifications to the total number of billable minutes, as wells as modifications to the revenue and expense allocations for these three years (AirTouch Ex. 12 at 15-22).

As referenced above, AirTouch Cellular has failed to maintain transactional records as required by the Commission's directives in 89-563. In the absence of such records the Commission is forced to rely on the most contemporaneous information maintained for the years in question. The Commission certainly finds it significant that, as discussed above, AirTouch Cellular, itself, admits that its own accounting failed to account for all charges to its affiliated retail arm for the years 1995-1997 (Tr. VI, 18, 19). The Commission is not persuaded by AirTouch Cellular's contention that its restated accounting eliminates any appearance of the failure to appropriately charge AirTouch Cellular retail for the wholesale service. In reaching this decision, the Commission notes that the restated accounting presented by AirTouch Cellular was not commenced until 1998, and was pursued only in response to discovery requests in the context of this case (AirTouch Ex. 12 at 11). The restated accounting was significantly modified inasmuch as it changed the prior presentation format previously utilized by the company, thereby significantly increasing the ultimate value of the reflected Ohio wholesale revenue (AirTouch Ex. 12 at 18). The restated wholesale revenue was

not submitted to the Commission until September 22, 1998, two months after the filing of the "Third Amended Complaint" in this matter, just months prior to the commencement of hearing in this case, and years after the filing of the original AirTouch Cellular annual reports. The restated accounting is far removed from the maintenance of contemporaneous accounting and transaction records as intended by the Commission in 89-563, and should, therefore, not be relied upon. It is through these mechanisms that the Commission hoped to be able to determine whether or not affiliated resellers receive access to any cellular services at prices, terms, and conditions different from those available to nonaffiliated resellers (89-563 Finding and Order at 22).

AirTouch Cellular is incorrect in its contentions that, rather than focusing its attention on whether its affiliated retail arm and Cellnet received the same rate, the Commission should focus its attention on whether the nonaffiliated retail rate was adjusted each time there was a change in the AirTouch Cellular retail rate (AirTouch Initial Br. at 26, 27). As described above, the Commission required that both affiliated and nonaffiliated wholesale customers would be purchasing service pursuant to the same terms and conditions. Pursuant to the 84-944 and 89-563 regulatory paradigm, retail activities are ultimately influenced as a result of the wholesale rates, terms, and conditions, rather than retail rates dictating the wholesale rates, terms, and conditions. As a result, AirTouch Cellular wholesale should have been cognizant of the rates, terms and conditions under which service was sold to AirTouch Cellular's retail arm. In the absence of transactional records, the Commission has no ability to examine the intentions of AirTouch Cellular relative to service "sold" to its retail affiliate. Rather, the Commission must rely on the contemporaneous accounting of AirTouch Cellular. As discussed above, there are numerous examples whereby the accounting relied upon identifies discriminatory

treatment which benefited AirTouch Cellular's retail affiliate relative to the wholesale terms and conditions under which service was purchased. While the Commission is unable to validate Cellnet's specific quantification of the wholesale price differential resulting from AirTouch Cellular's discriminatory acts (*i.e.* retroactive tiering, not charging for all minutes, etc.) the Commission concludes that the resulting effective wholesale price charged to AirTouch Cellular's retail affiliate was unjustifiably less than the wholesale rate charged to Cellnet for the time frame 1991-1997, as discussed below.

Considering the Commission's intentions, the Commission finds it problematic that Thomas Minardo, the individual in charge of AirTouch Cellular's nonaffiliated wholesale channel, was unaware of the rate charged by AirTouch Cellular wholesale to AirTouch Cellular retail, let alone that, pursuant to the Commission's directives in 89-563, AirTouch Cellular was to operate under a structure whereby AirTouch Cellular wholesale sold service to AirTouch Cellular retail (Tr. XII, 106). In the absence of such knowledge, the Commission agrees with Cellnet's contentions that it is impossible for AirTouch Cellular to ever be able to satisfy the principles espoused by the Commission's 84-944 and 89-563 orders relative to the nondiscriminatory provision of wholesale service. In addition, AirTouch Cellular is misguided in its focus with respect to the discrimination claims. Rather than comparing the rates charged to various nonaffiliated resellers, or comparing the rate charged to nonaffiliated resellers to those charged by AirTouch Cellular retail, the analysis with respect to discrimination must center on a comparison of the rates, terms, and conditions offered to affiliated resellers to those offered to nonaffiliated resellers (Tr. XII, 123, 135, 136). To this end, AirTouch Cellular wholesale has to be aware of the rate it is charging its affiliated retail arm in order to be certain

that it is not treating its nonaffiliated wholesale customers in a discriminatory manner.

Based on AirTouch Cellular's own admission, the Commission finds that AirTouch Cellular has violated the provisions of the 84-944 and 89-563 orders, as well as Section 4905.35, Revised Code, by seeking compensation in a manner different than that sought from Cellnet in the absence of any reasonable justification. Specifically, the Commission finds that AirTouch Cellular failed to capture all billable minutes that should have been charged to AirTouch Cellular's retail arm, while charging Cellnet for all of its minutes. For the 1991-1994 time frame, the omitted minutes included, but may not have been limited to, minutes for calls that either originated or terminated in Ohio but not both. For the 1995-1997 time frame, the omitted minutes included concession minutes,[68] promotion minutes, allowance minutes, and minutes for calls that either originated or terminated in Ohio but not both (Tr. VI, 17, 18, 34, 41, 42, 55, 73; AirTouch Ex. 12, at 15, 17, 21; Cellnet Initial Br. to AirTouch at 27-41). Additionally, the Commission finds that AirTouch Cellular failed to charge itself for the minutes of use provided to AirTouch Cellular retail in the Cincinnati market in 1994 (Tr. VII, 8-12; Cellnet Initial Br. to AirTouch at 68, 69).

In reaching this finding, the Commission concludes that the demonstration of the difference in billing practices is sufficient for establishing Cellnet's allegations relative to the 84-944 and 89-563 orders, as well as Section 4905.35, Revised Code. Specifically, the Commission concludes that this conduct signifies that cellular service was not provided pursuant to terms and conditions that are universally available on a nondiscriminatory basis to affiliated and nonaffiliated

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[68] The use of concession minutes by AirTouch Cellular's retail affiliate during 1994-1997 is discussed by Penny Burlison (Tr. IX, 42-45).

customers alike. The Commission recognizes that the failure to charge AirTouch Cellular's retail affiliate for all minutes-of-use has a direct impact on the effecctive rate charged to AirTouch Cellular retail as compared to that charged to Cellnet. The only justifications provided for the alleged conduct of not billing for all of the utilized minutes by AirTouch Cellular retail include a 1994 billing system change, a misunderstanding of what is to be included for the purpose of calculating the Commission assessment, and an oversight on behalf of AirTouch Cellular (Tr. VI, 19-23; Tr. VII, 8-12). The Commission finds that these explanations, when considered in conjunction with the lack of apparent recognition and compliance with the Commission's intentions of the Commission's 84-944 and 89-563 orders (i.e., failure to maintain transactional records and the failure to maintain contemporaneous accounting), does not excuse the resulting discrimination. To conclude otherwise, would negate the Commission's expressed desire to ensure that nonaffiliated resellers receive service on a nondiscriminatory basis.

The failure to bill its affiliated retail arm for all minutes utilized is facially discriminatory and is not negated by its contention that, although AirTouch Cellular retail and Cellnet are both wholesale customers, they are not similarly situated. As a result, the failure of AirTouch Cellular to bill its affiliated retail arm for all minutes utilized constitutes unreasonable discrimination as contemplated by Section 4905.35, Revised Code, as well as the intent of the 84-944 and 89-563 orders to prohibit discrimination in the manner in which service is provided to affiliated and nonaffiliated wholesale customers.

As a further basis for the Commission's determination of discrimination with respect to the allegations raised in Count II of Cellnet's complaint, the Commission finds that, for the time frame November 1997 through March 1998, AirTouch Cellular unfairly discriminated against Cellnet by refusing to provide digital wholesale rates to nonaffiliated wholesale customers,

while at the same offering discounted digital service rates to AirTouch Cellular retail customers. This conclusion is supported by AirTouch Cellular's own admission that it was offering digital service on a retail basis prior to offering those services to the wholesale channel, and that the rates offered to Cellnet for digital service were more than those offered to AirTouch Cellular retail customers (Tr. VIII, 31, 32; Tr. X, 108). The offering of a discounted retail digital service implies that the service was also provided to its affiliated retail arm at a discounted wholesale price during the November 1997 — March 1998 time frame. The failure to offer a nonaffiliated wholesale rate for digital service at the same time as offering the discounted digital service at the retail level signifies a violation of the 84-944 and 89-563 orders, as well as Section 4905.35, Revised Code. The Commission is not persuaded by AirTouch Cellular's justification for failing to offer nonaffiliated wholesale pricing contemporaneous with its offering of discounted affiliated digital service pricing. The failure to offer nonaffiliated wholesale pricing clearly provided an unreasonable competitive advantage in the retail market. The fact that Cellnet could have purchased digital services at retail prices or the fact that most of AirTouch Cellular's activations for the November 1997 — March 1998 time frame were analog in nature, has no bearing on the ultimate determination relative to the discriminatory offering of digital service (AirTouch Initial Br. at 26). The Commission also notes that the failure to offer digital resale is inconsistent with a facilities-based carrier's obligation to provide resale pursuant to 47 C.F.R. § 20.12. If AirTouch Cellular maintained its separate wholesale operations consistent with the Commission's directives, AirTouch Cellular's retail arm and nonaffiliated resellers would have been able to avail themselves of digital service at a wholesale level in a contemporaneous manner.

Cellnet represents that from 1992-1997, AirTouch Cellular retail offered free minutes, one time credits to retail customers' bills, waiver of charges, free equipment, and installation of equipment. Cellnet contends that a portion of these concessions were allocated to AirTouch Cellular's wholesale side (Tr. VI, 120-128). Despite this treatment, Cellnet insists that AirTouch Cellular wholesale did not provide similar concessions to Cellnet (Cellnet Initial Br. to AirTouch at 53). In response, AirTouch Cellular believes that, at least with respect to service-related credits, it is appropriate to allocate a portion of the promotion, and concession expenses to the wholesale side (AirTouch Reply Br. at 27).

The Commission finds that, while it may be reasonable for the aforementioned expenses to be partially allocated to AirTouch Cellular's wholesale side, AirTouch Cellular has not demonstrated that related credits have been extended to Cellnet. Neither AirTouch Exhibit 8 nor Exhibit 18 (both referenced by AirTouch Cellular) demonstrate that resellers, such as Cellnet, have received equipment or concession credits related to poor service (AirTouch Reply Br. at 27).

Additionally related to the issue of promotions, the Commission finds that, in the January — March 1996 and the July 1 — 31, 1996 time frames, by restricting wholesale promotions to a limited number of Cellnet customers, while not placing such a restriction on AirTouch Cellular's retail arm, AirTouch Cellular has violated the terms and conditions of the 89-563 Opinion and Order by acting in a discriminatory manner (Tr. XII, 93-100; AirTouch Ex. 18). Such an approach prevents Cellnet from being treated in the same manner as AirTouch Cellular, regardless of the volume of usage.

With respect to Cellnet's allegations relative to the discriminatory provision of equipment credits by AirTouch Cellular wholesale to its affiliated retail arm, the Commission

notes that AirTouch Cellular testified that AirTouch Cellular retail customer equipment expenses (concessions) were allocated to AirTouch Cellular's wholesale side, while at the same time, not providing similar credits to nonaffiliated resellers such as Cellnet (Tr. VI, 128; Cellnet Initial Br. at 53). This conclusion is supported by AirTouch Cellular's own admission that, from 1992-1997, 14 percent of the expenses related to the provision of expenses to provide equipment for promotional purposes or concessions was allocated between the wholesale and retail operations based on gross revenue or gross margin percentages (AirTouch Reply Br. at 42). Therefore, the record reflects that AirTouch Cellular's wholesale operations did not afford nonaffiliated resellers similar equipment credits for service-related problems, for the time frame 1992-1997. Such conduct constitutes discriminatory conduct.[69]

With respect to Cellnet's allegations relative to AirTouch Cellular's internal monthly recurring charge, the Commission finds that it is not in the appropriate position to determine whether directories or average number of subscribers should be utilized for the purposes of determining the recurring charges to be assessed by AirTouch Cellular wholesale to its retail affiliate. Cellnet argues that, regardless of the methodology utilized, the access rate charged to Cellnet is greater than that charged to AirTouch Cellular's retail operations. In response to Cellnet's allegations regarding discrimination due to the difference in recurring monthly access charges, the Commission notes that AirTouch Cellular has not objected to Cellnet's calculations which demonstrate that, regardless of whether directories or the average number of subscribers are utilized, in almost all cases, the recurring monthly access charge incurred by Cellnet was greater than the rate incurred by AirTouch Cellular's retail arm for the years 1994-1997 (Cellnet

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[69] This determination is also applicable to the allegations raised in Count III with respect to the provision of equipment by AirTouch Cellular wholesale.

Initial Br. to AirTouch at 49, 55, 63, 67). In particular, AirTouch Cellular has failed to provide any explanation for the difference in the recurring access charges even assuming that the number of directories is utilized. Therefore, the Commission agrees with Cellnet's allegations that for the years 1994-1997, AirTouch Cellular discriminated against Cellnet inasmuch as the recurring monthly access rate charged to Cellnet was greater than the rate charged to AirTouch Cellular's retail arm absent a justifiable explanation for the rate disparity.

In regard to Cellnet's allegations relative to its claim that AirTouch Cellular charged its own retail arm more favorable per minute peak and off peak usage rates than Cellnet for 1991-1997, the Commission concludes that, based on the examples of discrimination discussed throughout this Opinion and Order, it is reasonable to conclude that there is an unjust impact on the actual rates charged to Cellnet when compared to the effective rates charged to AirTouch Cellular's affiliated retail arm. The Commission also concludes that AirTouch Cellular failed to properly justify this discriminatory treatment.

With respect to the issue of AirTouch Cellular wholesale failing to charge its affiliated retail arm for toll services in 1991-1997 while charging Cellnet for such services during the identical time frame, the Commission concludes that AirTouch Cellular has treated Cellnet in a discriminatory fashion. Although AirTouch Cellular wholesale contends that it did not reflect a charge with respect to toll services due to the fact that it believed toll services to be optional in nature, the Commission points to the fact that the requirements stated in 89-563 clearly indicated that transaction records were necessary in order to determine whether or not the affiliated reseller received access to any cellular service, or any component bundled therewith, at prices and/or terms and conditions different from those available to nonaffiliated resellers (89-563

Finding and Order at 22). Toll service is plainly encompassed by that requirement. Additionally, while AirTouch Cellular states that most resellers choose another toll carrier with lower rates, this does not explain whether AirTouch Cellular's retail affiliate selected another provider (AirTouch Reply Br. at 25). In the absence of any records establishing such a charge or a justifiable explanation for the absence of such a charge, the Commission concludes that AirTouch Cellular wholesale has failed to charge AirTouch Cellular retail for the provision of toll service despite the fact that it did indeed charge Cellnet for toll service. As a result of such conduct, AirTouch Cellular has discriminated against Cellnet.

Relative to Cellnet's allegations that AirTouch Cellular's wholesale affiliate acted in a discriminatory manner by not charging its retail affiliate for the reserving of blocks of telephone numbers, the Commission can certainly accept AirTouch Cellular's explanation that, beginning in 1995, reserve charges were no longer necessary due to the fact that wholesale customers could essentially order numbers on an as needed basis. This explanation does not, however, address the disparity in treatment as alleged for 1991-1994. Therefore, the Commission concludes that with respect to the time frame 1991-1994, the Commission concludes that AirTouch Cellular retail was reserving telephone numbers from AirTouch Cellular wholesale in the absence of any compensation, while charging Cellnet for number reservation. The Commission concludes that this conduct constituted discriminatory conduct as alleged in the complaint.

With respect to Cellnet's allegations pertaining to AirTouch Cellular wholesale's failure to charge its retail affiliate for directory assistance, the Commission recognizes that Cellnet's allegations specifically concern the fact that AirTouch Cellular wholesale did not assess a charge to AirTouch Cellular retail for the 1991-1995 time frame. AirTouch Cellular attempts to

justify its conduct relative to directory assistance by explaining that directory assistance call completion was offered to resellers in Cleveland beginning on September 15, 1995. AirTouch Cellular contends that, once directory assistance call completion commenced, it was assumed that all directory assistance calls were call completion calls. AirTouch Cellular goes on to argue that "It was reasonable for AirTouch Cellular to not charge its retail operations for directory assistance prior to 1996 because, prior to 1996, directory assistance was not provided by the wholesale company" (AirTouch Reply Br. at 25). Those contentions fail to refute Cellnet's allegations that, consistent with Cellnet Exhibit 188, it was charged by AirTouch Cellular wholesale while AirTouch Cellular retail was not for 1991-1995. Further, AirTouch Cellular has failed to provide any explanation for the disparity in directory assistance charges, including why Cellnet was charged by AirTouch Cellular wholesale for directory assistance if the service was not provided by the wholesale company prior to 1996.

Concerning Cellnet's allegations relative to the failure of AirTouch Cellular to charge forwarding and transfer fees to its retail affiliate from September to December 1994, based on a review of the record, the Commission concludes that the AirTouch Cellular has not refuted Cellnet's allegations pertaining to this issue and has, instead, acquiesced and implicitly admitted those claims. Specifically, the Commission notes that AirTouch Cellular's briefs in this matter are void of any discussion on this issue. Therefore, the Commission finds Cellnet's allegations with respect to this issue to be reasonable.

In regard to Cellnet's allegations relative to the AirTouch Cellular's practice, in 1995, of utilizing a retroactive rate plan structure for its affiliated retail arm while at the same time charging Cellnet pursuant to a nonretroactive rate plan rate structure, the Commission considers this practice to signify

discriminatory conduct. As stated above, AirTouch Cellular represents that it has charged itself consistent with either the terms and conditions of the wholesale tariffs or wholesale rate plans. Despite this representation, AirTouch Cellular has failed to identify the specific terms and conditions which permit for the distinction in the nonretroactive/retroactive application of rates. In addition, the Commission finds it significant to note that AirTouch Cellular itself acknowledges that, in hindsight, the retroactive practice of viewing AirTouch Cellular retail as one customer and charging all of its minutes at the bottom tier was incorrect. AirTouch Cellular also recognized that the retroactive application of the rate plan resulted in a lower rate being charged to the affiliated retail arm (Tr. VII, 76, 78, 79).

The Commission rejects AirTouch Cellular's contention that its practice with respect to retroactive rate plans is justified because Cellnet and AirTouch Cellular's affiliated retail arm are not similarly situated. While volume discounts based on the unique circumstances of a wholesale customer may be acceptable pursuant to the terms and conditions of the referenced tariffs and rate plans, it is discriminatory to utilize a retroactive application for one wholesale customer and a nonretroactive application for another wholesale customer. In doing so, AirTouch Cellular is no longer providing access pursuant to terms, conditions, and prices that are universally available on a nondiscriminatory basis. Rather, AirTouch Cellular has engaged in conduct whereby it is applying one set of terms and conditions for its affiliated retail arm and a different set of terms and conditions for nonaffiliated wholesale customers. Under such a scenario, Cellnet would never have the same terms and conditions applied to it, even in the situation in which Cellnet purchased the identical number of minutes as AirTouch Cellular.

Specific to Cellnet's allegations relative to the appropriateness of AirTouch Cellular's use of the "Reseller

Exclusive II" rate plan during the November 1996 to December 1997 time frame, the Commission finds that this determination is largely based on interpretations of the federal resale requirements.[70] In this regard, the Commission concludes that this issue is best left for the FCC based on the specific facts presented by this case.

Finally, the Commission recognizes that Cellnet has raised allegations related to AirTouch Cellular's possible violations of Section 4905.33, Revised Code, with respect to the furnishing of free service or the provisioning of service for less than cost for the purpose of destroying competition (Cellnet's Initial Br. to AirTouch at 78-88). These allegations are also raised in Count IV of the complaint and are addressed in the Commission's discussion of Count IV.

To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and Order, they are denied.

C. Count III — Respondents Have Violated the Commission's Orders, as well as Other Ohio Law, by Providing Certain Nonrate Related Benefits to its Affiliated Retail Operations Which it did not Provide to Cellnet.[71]

1. Cellnet Relative to AirTouch Cellular (Count III)

As stated above, Cellnet relies on pertinent sections of the 84-944 and 89-563 orders to illustrate other examples of discriminatory treatment by AirTouch Cellular. Cellnet believes

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[70] CC Docket No. 94-54, FCC 96-163 First Report and Order (rel. July 12, 1996), Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services.

[71] The Commission notes that Cellnet's initial and reply briefs failed to identify any specific allegations of Count III pertaining to Ameritech Mobile.

that the 89-563 guidelines require that AirTouch Cellular wholesale provide access to cellular services pursuant to terms and conditions which are universally available on a nondiscriminatory basis to both affiliated and nonaffiliated customers. Cellnet also interprets the 84-944 Opinion and Order to require that AirTouch Cellular retail have no involvement whatsoever in the wholesale operations of the underlying carrier (Cellnet Initial Br. to AirTouch at 88).

In addition to alleging that the actual rates charged by AirTouch Cellular wholesale to Cellnet are discriminatory, Cellnet alleges that, consistent with the principles stated in the *Youngstown Thermal* decision, the Commission must consider whether nonmonetary benefits were provided by AirTouch Cellular wholesale to AirTouch Cellular retail, to the detriment of Cellnet (*Id.* at 88, 89).

(a) Billing

For all relevant times through 1993, Cellnet alleges that AirTouch Cellular's wholesale tariff allowed for the purchase of billing services at a rate of $ 2.00 per access number per month. Despite this tariffed service, Cellnet contends that, as early as the spring of 1991, AirTouch Cellular refused to offer billing services to Cellnet, while at the same time providing billing services to its affiliated retail arm. In support of this allegation, Cellnet references AirTouch Cellular's accounting, as contained in Cellnet Exhibit 103 for 1991, 1992, 1993, and 1994. Cellnet asserts that this refusal to provide the tariffed billing services was discriminatory in nature and violates the 84-944 and 89-563 orders (*Id.* at 90, 91; Cellnet Reply Br. to AirTouch at 24).

(b) "Star" Numbers

Cellnet defines "star" numbers as a specific pre-assigned calling pattern that is used by AirTouch Cellular retail

customers to access some type of service at no charge to the end user (Cellnet Initial Br. to AirTouch at 91).[72] Although Cellnet does not object to the AirTouch Cellular retail customers not being charged for the "star" number airtime, Cellnet does object to the fact that AirTouch Cellular wholesale does not charge AirTouch Cellular retail for the airtime or the free advertising received as a result of the use of the "star" number. Cellnet believes that by not extending these similar benefits to Cellnet, AirTouch Cellular is in violation of the 84-944 and 89-563 orders (Tr. IV. 190, 192; Cellnet Initial Br. to AirTouch at 91, 92).

(c) Voice Mail

Cellnet purports that, prior to July 1994, AirTouch Cellular relied on a third party for the provision of voice mail. During this time, Cellnet elected to utilize its own vendor for voice mail and arranged for AirTouch Cellular to forward its lines to its own voice mail vendor. AirTouch Cellular either allowed for the forwarding at no charge in the Cleveland, Akron, and Canton markets, or at $ .08/call charge in the southern Ohio markets. Beginning in June 1994, AirTouch Cellular began charging Cellnet a rate of $ .15 per minute to either forward lines to Cellnet's own vendor or utilize AirTouch Cellular's voice mail service. In contrast to these charges, Cellnet states that AirTouch Cellular wholesale was not charging its own affiliated reseller anything for call forwarding or voice mail (*Id.* at 92, 93; Cellnet Ex. 188 at Ex. A at 13).

(d) Switch Interconnection

Cellnet alleges that AirTouch Cellular retail stores have enjoyed virtual instant ability to activate, deactivate, and make

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[72] Examples of this service include *611 to access AirTouch Cellular customer service or the use of a star number to contact a television or radio station at no charge.

changes to end user customer lines at the AirTouch Cellular switch since their inception in 1989. In comparison, Cellnet states that, since its inception in 1991, it has not possessed similar capabilities. Prior to 1994, Cellnet had to run its activations and changes through an AirTouch Cellular representative. This process resulted in long delays in the provisioning of end user service (Cellnet Initial Br. to AirTouch at 93, 94). Although Cellnet acknowledges that the situation has improved since the installation of its own activation terminal in 1994, Cellnet still asserts that its terminals have less capability than those of the AirTouch Cellular retail stores. The alleged shortcomings include the inability of Cellnet to get call records in virtual real time, while AirTouch Cellular retail possesses this capability (*Id.* at 94).

(e) Equipment

Cellnet contends that AirTouch Cellular wholesale did not provide any equipment concessions to Cellnet despite the fact that, from 1992-1997, the cost of retail equipment was proportionally allocated to the wholesale side. Therefore, Cellnet asserts that any proportional allocation of equipment expense to AirTouch Cellular wholesale is inappropriate (*Id.* at 94-95; Cellnet Reply Br. to AirTouch at 25). Consistent with the Commission's determination in *Youngstown Thermal*, Cellnet believes that the provision of equipment must be considered as an element of a discrimination claim since it was used as an inducement for the sale of cellular services (Cellnet Initial Br. to AirTouch. at 95).

Similarly, Cellnet states that on August 31, 1993, it was notified that AirTouch Cellular's wholesale arm was discontinuing Cellnet's participation in the equipment rental program. Despite this action, Cellnet asserts that AirTouch Cellular wholesale continued to offer a rental program to AirTouch Cellular retail (Cellnet Ex. 111). Cellnet asserts that

both of these examples violate the nondiscrimination principles of the 84-944 and 89-563 orders (Cellnet Initial Br. at 94, 95, 96).

2. AirTouch Cellular Reply (Count III)

AirTouch Cellular surmises that it is entitled to judgment with respect to Count III in light of the fact that (1) there is no legal requirement that cellular wholesale carriers provide resellers with nonrate-related support, (2) there is no support that AirTouch Cellular wholesale provided the identified services to AirTouch Cellular retail at no charge, and (3) there is no evidence that AirTouch Cellular retail had greater access to the network facilities than nonaffiliated resellers (AirTouch Initial Br. at 32, 36, 37).

(a) Switch Interconnection

AirTouch Cellular rejects Cellnet's argument that its retail operations had direct access to the network switches or facilities. AirTouch Cellular believes that, based on the testimony of Mr. VanScoy, nonaffiliated resellers have the same ability to access the "system" as an AirTouch Cellular retail through the function of remote access (AirTouch Initial Br. at 32). AirTouch Cellular refutes any claim that AirTouch Cellular retail had direct switch access, the option of real time billing, or the provision of free voice mail (AirTouch Initial Br. at 32; AirTouch Reply Br. at 41).

(b) Billing

AirTouch Cellular states that billing services are provided by the information services department, a joint operating account. Since AirTouch Cellular wholesale and AirTouch Cellular retail both derive benefit from the billing services, the billing expenses are allocated between the wholesale and retail operations based on their respective gross margins (AirTouch Initial Br. at 34).

Since its wholesale arm does not directly provide billing services, AirTouch Cellular insists that it was not legally obligated to provide specialized billing services to resellers, despite the fact that billing services were mentioned as an option in a company wholesale tariff from 1991-1994 (AirTouch Reply Br. at 40). In particular, AirTouch Cellular asserts that the FCC has determined that cellular providers are not required to provide specialized billing services to resellers. Regardless, AirTouch Cellular references the fact that the tariff offering was withdrawn pursuant to the detariffing determination reached in 89-563 and unenforceable after the passage of the Budget Act of 1993 (AirTouch Reply Br. at 40). Finally, AirTouch Cellular refutes any claim that AirTouch Cellular retail had the option of real time billing (AirTouch Reply Br. at 41).

(c) Equipment

AirTouch Cellular represents that the evidence at hearing clearly established that the provision of free or discounted equipment is a function of its retail operations. Based on the percentages delineated in Cellnet Exhibit 195 and AirTouch Cellular Exhibit 13, AirTouch Cellular believes that it is apparent that the equipment expense related to its sales is designated entirely as a retail expense. At the same time, AirTouch Cellular identifies the fact that promotional and concession equipment-related expenses related to customer care are jointly allocated between retail and wholesale due to the fact that some of the concession expenses were due to service-related problems (AirTouch Initial Br. at 35; AirTouch Reply Br. at 42).

AirTouch Cellular provides that Cellnet was able to fully avail itself of the equipment rental program that was offered from 1991 to 1993. While AirTouch Cellular acknowledges that, subsequent to 1993, Cellnet was denied participation in the

equipment rental program, it believes that there was no obligation to continue the equipment rental program in light of the fact that equipment was a retail offering outside the scope of the Commission's wholesale jurisdiction (AirTouch Initial Br. at 20).

(d) Trade Name Usage

AirTouch Cellular rejects any claim that AirTouch Cellular wholesale provides AirTouch Cellular retail with trade name usage absent a charge. Rather, AirTouch Cellular insists that, pursuant to its accounting, any expenses associated with the usage of a trade name would be either charged entirely to its retail affiliate or allocated between retail and wholesale based on gross revenue or gross margin (AirTouch Initial Br. at 36).

(e) "Star" Numbers

AirTouch Cellular rejects any claim that the use of "star" numbers constitutes a claim of discrimination or anticompetitive conduct. AirTouch Cellular explains that "star" numbers are provided for a public benefit (i.e., to report accidents) and that the "star" numbers contained in Cellnet Exhibit 125 are of value to both AirTouch Cellular retail and Cellnet customers (AirTouch Reply Br. at 41).

(f) Voice Mail

AirTouch Cellular refutes any contention that its retail affiliate received free voice mail. Specific to this point, AirTouch Cellular references the accounting contained in Cellnet Exhibit 103 for 1994 and 1996 (AirTouch Reply Br. at 41).

(i) Ruling: Count III — Allegations relative to AirTouch Cellular

With respect to the issue of billing services for the time frame of 1991-1993, the Commission concurs with the

arguments raised by Cellnet. For the time frame 1991-1993, AirTouch Cellular's wholesale tariff specifically offered a billing service on a wholesale basis. The Commission notes, for example, that billing services offered to all wholesale customers, which would include Cellnet, was addressed on page 40 of the AirTouch Cellular tariff approved in Case No. 91-1303-RC-ATA (Cellnet Ex. 101). The billing services offered pursuant to tariff provide as follows:

> At the request of the wholesale customer, the Partnership will prepare, or have prepared, bills for individual end user accounts. Such bills will include local usage detailed billing (Cellnet Ex. 101, 41).

Similar language is contained in AirTouch Cellular's wholesale tariffs effective July 19, 1991 (Case No. 89-1861-RC-ATC), August 1992 (Case No. 91-2135-RC-ACE), and January 1993 (Case No. 92-1156-RC-ATC). The tariffs contain no additional restrictions or conditions relative to the provision of end user billing services. Any provision of billing services to AirTouch Cellular retail for the 1991-1993 time frame should have similarly been provided to Cellnet pursuant to these tariff provisions. Additionally, AirTouch Cellular does not refute Cellnet's allegations that, as evidenced by Cellnet Exhibit 103, AirTouch Cellular wholesale, from 1991-1994 provided billing services to AirTouch Cellular retail. Therefore, to the extent that AirTouch Cellular failed to provide billing services pursuant to these tariffs during the time frame of 1991-1993, it has discriminated against Cellnet.[73]

The Commission dismisses AirTouch Cellular's contention that, because the billing services were not directly provided by

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[73] While AirTouch Cellular references the fact that it is not required to provide specialized billing services to resellers, there is no substantiation that this was requested by Cellnet during the 1991-1993 time frame (AirTouch Reply Br. at 40).

AirTouch Cellular wholesale, it did not have an obligation to provide billing services to Cellnet. Regardless of the manner in which the services are ultimately provided, because billing services were included in its tariffs, AirTouch Cellular's wholesale affiliate had an obligation to extend these services to Cellnet in accordance with its tariff.

In regard to Cellnet's allegations relative to the billing services in 1994, the Commission finds that, in light of the suspension of cellular tariffs pursuant to 89-563, the Commission's consideration of this issue no longer centers on an analysis of the discriminatory application of a tariffed service (i.e., end user billing). Further, the Commission recognizes that, absent specific tariff provisions, the Commission has previously determined that billing and collection services should be deregulated.[74] Therefore, the Commission finds no basis to further consider Cellnet's allegations relative to the failure to provide billing services.

Upon a review of the record relative to Cellnet's allegations of discrimination, the Commission concludes that related to the use of "star" numbers, for end user usage of AirTouch Cellular numbers, the Commission finds that AirTouch Cellular has not refuted the allegations that it is not charging its retail arm for access to "star" numbers, while at the same time charging Cellnet airtime for similar calls (Tr. IV, 186, 190-192). The provisioning of "star" numbers in this fashion is discriminatory and a violation of the 89-563 requirement that access to cellular service, or any component bundled therewith, shall be available to affiliated and nonaffiliated alike.

In regard to Cellnet's allegations of discrimination related to the AirTouch Cellular discontinuation of the equipment

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[74] See *In the Matter of the Commission's Investigation into the Detariffing of Billing and Collection Services Offered by Ohio's Local Exchange Companies*, Case No. 86-2174-TP-COI, Finding and Order, October 6, 1987.

rental program, the Commission concludes that this allegation of discrimination is properly before the Commission inasmuch as the 89-563 Order identified bundling cellular service as one of the issues to consider relative to the issue of discriminatory treatment (89-563 Finding and Order at 22). In addition, the FCC has clearly stated that the Commission has the authority to resolve matters related to the bundling of services and equipment (Order on Reconsideration, PR Docket No. 94-109, at 5.)

The Commission notes that despite AirTouch Cellular's contention that the rental program was part of AirTouch Cellular's retail operations and not its wholesale operations, it is unrefuted that, up until late 1993, Cellnet as a wholesale customer participated in the rental equipment program (Tr. IV, 130, 138; AirTouch Initial Br. at 20). Therefore, this service should have been considered as a wholesale service provided to both AirTouch Cellular's affiliated retail arm and Cellnet, and properly reflected as such in the relevant accounting. The continuation of the equipment rental program to AirTouch Cellular's retail arm subsequent to the cessation of the offering of the program to Cellnet, as evidenced by Cellnet Exhibit 111, constitutes discriminatory treatment as contemplated by the Commission's 84-944 and 89-563 orders.

In addition, while AirTouch Cellular admits that a portion of the equipment expense was allocated to the wholesale side as a result of its relationship to customer care, the record does not reflect that AirTouch Cellular extended similar wholesale equipment-related credits to Cellnet. Such conduct constitutes discriminatory treatment as contemplated by the Commission's prior orders.

Relative to Cellnet's allegations of discrimination pertaining to switch interconnection, the Commission finds that from 1991-1994, Cellnet was indeed provided an inferior level of

switch interconnection compared to AirTouch Cellular retail for the purpose of end user activations and changes. AirTouch Cellular retail certainly was put in a better competitive position as a result of having the ability to activate service on an automated basis rather than having to rely on manual intervention as required for Cellnet (Tr. IV, 206-208). For the time period subsequent to the installation of Cellnet's terminals, Cellnet has failed to establish that AirTouch Cellular retail received better switch interconnection than Cellnet for the purpose of establishing service. While Cellnet claims that, in many cases, its terminal, when compared to AirTouch Cellular's retail terminal, is limited in nature, the Commission finds that the record does not support these differences (*Id.* at 206; Tr. IX, 30-32).

In regard to Cellnet's allegations pertaining to AirTouch Cellular wholesale denying Cellnet the ability to get its call records in near real time while at the same time providing this capability to AirTouch Cellular retail, the Commission finds that Cellnet has failed to demonstrate that AirTouch Cellular retail was availing itself of any technology possessed by AirTouch Cellular wholesale for the purpose of receiving real time billing (Tr. IV, 215, 216; Tr. IX, 32). Therefore, the Commission concludes that the allegations in Count III relative to this issue have not been established.

Specific to the allegations raised in the complaint related to AirTouch Cellular providing its retail affiliates with a nonmonetary benefit of trade name usage while charging Cellnet for a benefit it cannot use, the Commission finds that Cellnet's briefs fail to address this matter. The Commission concludes that Cellnet has failed to meet its burden of proof with respect to these allegations.

Finally, with respect to Cellnet's allegations of discrimination related to the provision of voice mail, the

Commission concludes that AirTouch Cellular's wholesale arm did charge its affiliated retail arm for the provision of voice mail. This is substantiated by AirTouch Cellular's accounting that reflects wholesale revenue resulting from the provision of voice mail service to its affiliated retail arm. As an example of the wholesale revenue related to the provision of voice mail, the Commission refers to Cellnet Exhibit 103 (i.e., 1994, AT-0001609, AT-0001610). The Commission also recognizes that despite Cellnet's reliance on the testimony of its expert Mr. Robert Ferguson relative to this issue, Mr. Ferguson did not discuss voice mail charges as referenced by Cellnet (Cellnet Initial Br. at 93; Cellnet Ex. 188, Sub Ex. B at 13).

To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and Order, they are denied.

D. Count IV — Ameritech Mobile and AirTouch Cellular Unlawfully Cross-Subsidized Their Retail Operations for the Purpose of Destroying Competition

1. Cellnet Relative to Ameritech Mobile (Count IV)

Cellnet alleges that, since 1993, Ameritech Mobile wholesale has unlawfully cross-subsidized Ameritech Mobile retail by providing free service for the purpose of destroying competition (Cellnet Reply Br. to Ameritech at 11). Cellnet highlights the inability of Ameritech Mobile's employees to identify an internal wholesale rate. At best, Cellnet insists that Ameritech Mobile wholesale was only able conjecture as to the variables which might be considered for the purpose of establishing a hypothetical internal affiliate wholesale rate (Tr. II, 105; Cellnet Reply Br. at 12). Cellnet rejects any argument that Ameritech Mobile retail is entitled to a discounted wholesale rate because it has made an exclusive commitment to Ameritech Mobile wholesale. In support of this position, Cellnet opines that Ameritech Mobile wholesale rate structures

do not specify a distinction between exclusive and nonexclusive arrangements (*Id.* at 12).

2. Ameritech Mobile Relative to Alleged Cross-Subsidization (Count IV)

In response to allegations in Cellnet's complaint that, as result of cross-subsidization, Ameritech Mobile retail is providing service below cost for the purpose of destroying competition, Ameritech Mobile indicates that its retail pricing is structured to meet the competitive marketplace, while taking into account the costs of the business (Tr. III, 39, 40). Ameritech Mobile insists that costs, the marketplace, and reseller viability are all taken into account when establishing prices (*Id.* at 55-57). Ameritech Mobile identifies the fact that it provides resellers with their own rate matrix and that promotions and all features are available to resellers (Tr. II, 79; Tr. III, 54, 55). Equipment is made available to resellers on exactly the same terms and conditions as made available to Ameritech Mobile's retail affiliate (Tr. II, 100). Ameritech Mobile represented that, at the time of hearing, it had ten resellers in Ohio and a resale channel which supported this operation (Tr. II, 87; Ameritech Initial Br. at 22, 23; Ameritech Reply Br. at 42, 46, 47, 50). Ameritech Mobile distinguished its own retail operations from Cellnet by pointing to a significant greater magnitude of volume, as well as distinctions due to credit history, credit position, and willingness to obtain service exclusively from Ameritech Mobile wholesale (Ameritech Initial Br. at 23, 24). Ameritech Mobile discusses the process which it would utilize if it had to establish an internal rate (Tr. II, 105, 106).

To the extent that any allegations of cross-subsidization are based on the 89-563 order, Ameritech Mobile distinguishes those holdings from the current case due to the belief that the 89-563 order only addressed potential cross-subsidization

between local exchange carriers and competitive telecommunication service providers, and did not address internal competitive service provider cross-subsidization (Ameritech Reply Br. at 34).

(a) Ruling: Count IV — Allegations Against Ameritech Mobile

The essence of Count IV of Cellnet's third amended complaint raises allegations that Ameritech Mobile wholesale has engaged in the cross-subsidization of Ameritech Mobile retail for the purpose of destroying competition. The Commission has already determined, as discussed above, that by not offering Cellnet the same rate structure, terms, and conditions as offered to Ameritech Mobile retail, Ameritech Mobile wholesale has discriminated against Cellnet.

With respect to analyzing whether the alleged conduct was engaged in for the purpose of destroying competition, the Commission has previously ruled that:

> Destroying competition occurs when there is a material risk that consumers will be denied access to a provider of a product or service for the utility service at issue. Destroying competition encompasses the concept of foreclosing or terminating access to a market that is broader than the point at which the actual competition occurs such that other consumers are denied any competitive choice or at least another competitive choice.

Youngstown Thermal, Finding and Order at 41. The Commission went on to state that destroying competition does not require a showing that competition was actually foreclosed or terminated but only that an attempt to do so was actively pursued (*Id.* at 41).

While it may be true that, as delineated above, Ameritech Mobile has engaged in discriminatory conduct, this conclusion

does not equate with a finding that Ameritech Mobile has actively pursued the destruction of competition. In order to succeed relative to allegations of destroying competition, the complainant must establish something beyond the mere demonstration of discrimination. To this end, Cellnet has not presented sufficient evidence to satisfy its burden of proof. As reflected by the record, Ameritech Mobile did, on least two occasions, extend service offers to Cellnet. The Commission also recognizes that, at the time of the hearing, Ameritech Mobile represented that it had at least ten resellers for which it was providing service. Ameritech Mobile also represented that, as early as 1994, it was providing service to resellers (Tr. I, 59; Tr. II, 87). Such facts do not support the allegations in this count of the complaint. Therefore, the Commission cannot conclude that Ameritech Mobile actively pursued the opportunity to destroy competition in violation of Section 4905.33, Revised Code.

To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and Order, they are denied.

3. Cellnet Relative to AirTouch Cellular (Count IV)

Pursuant to the 84-944 and 89-563 orders, Cellnet believes that AirTouch Cellular wholesale is prohibited from subsidizing the operations of AirTouch Cellular retail, unless it similarly provides a subsidy to nonaffiliated resellers. Cellnet bases this belief, in part, on the prohibition of the 84-944 and 89-563 orders regarding the involvement between wholesale and affiliated retail operations (Cellnet Reply Br. to AirTouch at 25). Cellnet also interprets a subsidy to be akin to a rebate, prohibited pursuant to Section 4905.33, Revised Code, or something resulting in unfair advantage, prohibited by Section 4905.35, Revised Code, (*Id.* at 26). For the purpose of characterizing its claim of cross-subsidization, Cellnet assumes

that, for the time period pertinent to the complaint, the wholesale cellular market was not competitive, while the cellular retail operations were competitive (*Id.* at 44).

Specific to any allegations pertaining to Section 4905.33, Revised Code, Cellnet interprets the statutory provision to provide for two independent courses of action; the first one relating to the prohibition from offering service below cost, and the second one related to the prohibition on charging discriminatory rates for the purpose of destroying competition. With respect to the second course of action, Cellnet believes that, consistent with the holding in *Youngstown Thermal*, "the purposeful intent to destroy competition may be presumed." Cellnet does not believe that AirTouch Cellular has offered any evidence to show reasonable justification for the alleged conduct (*Id.* at 41). Cellnet characterizes the justifications provided by AirTouch Cellular's witness Dr. Blackwell as theoretical in nature and not specific to the actual facts of this case (*Id.* at 42).

Cellnet opines that the issue of whether the cellular retail market is competitive has no bearing on whether AirTouch Cellular has discriminated against Cellnet. In the alternative, Cellnet attempts to establish that, as reflected by the cited federal authority, cellular service was not competitive during the relevant time frames incorporated in the complaint (*Id.* at 44).

Based on the testimony of its expert witness, Mr. Robert Ferguson, Cellnet contends that, when correcting for the aforementioned incorrect assumptions, the accounting will demonstrate that, from 1991 to 1997, AirTouch Cellular retail was operating at a loss. Therefore, Cellnet concludes that AirTouch Cellular wholesale must have been providing cross-subsidization to AirTouch Cellular retail (Cellnet Initial Br. to

AirTouch at 97, 98). In particular, Cellnet contends that the alleged subsidy is evident based on the fact that:

(1) the original income statements did not account for 100 percent of the airtime and access charges;

(2) promotional, concession, and allowance minutes were not included in the original income statements for 1995 to 1997;

(3) access charges were calculated based on the number of directories rather than subscribers for the years 1995 to 1997.

Cellnet surmises that the extent of this cross-subsidization would have been even more severe had AirTouch Cellular wholesale utilized the appropriate expense methodology, rather than relying on the allocation of joint costs based on the percentage of revenue earned by the respective wholesale and retail operations (*Id.* at 98, 99). Cellnet alleges that the allocation utilized by AirTouch Cellular is not supported by any GAAP or any other standard in the accounting field (*Id.* at 100).

Cellnet concludes that it is incorrect to simply allocate expenses based on the percentage of revenue derived from the wholesale or retail side of the business. Rather, Cellnet asserts that it is important to look at the underlying nature of the cost and its correlation to a specific side of the business (*Id.* at 101). Only then does Cellnet believe that one could approximate the expenses that would exist if there was a stand-alone wholesale and retail cellular operation.

Cellnet also asserts that AirTouch Cellular has incorrectly identified certain categories of expenses to be allocated. Specifically, Cellnet submits that "customer care", including concessions expenses, should not have been allocated in light of the fact that AirTouch Cellular wholesale does not incur these expenses when selling to resellers. In support of its

position, Cellnet alleges that in 1997, more than half of the "customer care" expenses were allocated to wholesale operations (*Id.* at 102, 103). Cellnet argues that, since nonaffiliated resellers did not receive similar concessions, the "customer care" expenses should have been direct expenses to AirTouch Cellular retail rather than partially allocated to AirTouch Cellular wholesale (*Id.* at 103-107).

Cellnet disputes any contention that its expert witness should have considered AirTouch Cellular restated accounting for the years 1995-1997. Cellnet interprets the 89-563 Order to require contemporaneous accounting, and not allow for the eventual restating of such information. Cellnet points out that only the nonrestated accounting records would have been in existence if the Commission had examined AirTouch Cellular's accounting in 1995, 1996, or 1997. It is Cellnet's belief that the original accounting reflects the discriminatory terms and conditions under which the service was provided to AirTouch Cellular retail. Cellnet insists that to now simply allow a restatement of the accounting would result in circumventing the provisions of 84-944 and 89-563 (Cellnet Reply Br. to AirTouch at 30).

With respect to the issue of whether recurring access charges should be based on the number of subscribers or the number of directories (telephone numbers), as discussed above, Cellnet emphasizes that this determination has a direct bearing on the calculation of access charges. Cellnet specifically identifies the fact that for the time frame 1995-1997, the number of directories has been lower than the average number of subscribers. Therefore, AirTouch Cellular's reliance on the number of directories results in a lower calculated wholesale revenue, and ultimately results in a lower annual Commission assessment payment for the years 1995-1997 (*Id.* at 40).

Cellnet concludes that the number of directories can never be lower than the average number of subscribers since every subscriber must have a telephone number (*Id.* at 31, 32). As further support for its belief that the average number of subscribers is the appropriate measurement for the calculation of access charges, Cellnet relies on the testimony of Mr. Gregory Gorelick, Controller from 1986 — August 1996. Mr. Gorelick referenced the significance of the number of subscribers (*Id.* at 32). Cellnet also identifies the fact that AirTouch Cellular, in its initial brief (Initial Br. at 9), discussed the importance of the number of subscribers (Cellnet Reply Br. to AirTouch at 32, 33).

As further support for its position, Cellnet focuses on the admission of DelAnn Martin that the number of directories are based on the number of subscribers. Therefore, Cellnet contends that if the number of directories are correct, the number of subscribers must be as well (*Id.* at 33-35). In addition Cellnet discusses the testimony of Leigh Wood, the former CEO of AirTouch Cellular, in which she implied that the average revenue per user is more accurately calculated by utilizing the average number of subscribers and not the number of directories (*Id.* at 40).

4. AirTouch Cellular Relative to Cross-Subsidization (Count IV)

AirTouch Cellular does not believe that Sections 4905.22, 4905.33, or 4905.35, Revised Code, affirmatively require cellular providers to segregate their wholesale and retail operations. Therefore, AirTouch Cellular contends that there can be no prohibition against the cross-subsidization between the wholesale and retail service of AirTouch Cellular (AirTouch Initial Br. at 37). In addition AirTouch Cellular asserts that cross-subsidization concerns are only applicable in those situations in which a provider uses services that are not

competitive to subsidize services that are subject to competition. AirTouch Cellular considers the provision of both wholesale and retail cellular service to be competitive services. AirTouch Cellular states that cross-subsidization has never been prohibited in connection with competitive services (*Id.* at 38-40).

Even if a claim of cross-subsidization could be stated, AirTouch Cellular asserts that Cellnet has failed to establish that AirTouch Cellular cross-subsidizes its retail operations with wholesale profits. In particular, AirTouch Cellular concludes that Mr. Ferguson's restatements are based on erroneous assumptions. Specifically, AirTouch Cellular points to the improper inclusion of the cost of sales to nonaffiliated resellers as part of the calculation of retail cost of sales for 1997 (*Id.* at 40).

In addition, AirTouch Cellular objects to the failure of Mr. Ferguson to recognize that its restated income statements had addressed the exclusion of airtime revenue and expense associated with interstate calls and access charge revenue derived from out-of-state subscribers (*Id.* at 41, 42). AirTouch Cellular relies on its Exhibit 10 to demonstrate that, had Mr. Ferguson compared his 1996 results to AirTouch Cellular's restated accounting, the differences in wholesale revenue and reported cost of sales would have been insignificant (*Id.* at 41, 42).

AirTouch Cellular is troubled by the fact that, in his comparisons, Mr. Ferguson failed to adjust the expenses allocated to retail in 1995 and 1996. Rather than using the allocated expense from the restated income statement, which lowered the allocated retail expenses, AirTouch Cellular believes that he incorrectly continued to use the retail expenses from the original, nonrestated income statements (*Id.* at 43, 45, 46). While AirTouch Cellular acknowledges that an allocation

method of shared or joint expenses is not 100 percent accurate, the methodology is reasonable and consistent with GAAP [FAS 14(d)] (AirTouch Reply Br. at 44).

With respect to Cellnet's allegations regarding AirTouch Cellular's allocation methodology, AirTouch Cellular contends that Cellnet inaccurately stated that 69 percent of the total customer care expenses were allocated to wholesale. AirTouch Cellular clarifies that the 69 percent was allocated to "customer operations," which includes customer care, as well as other activities such as accounts receivables, bad debt, and fraud (*Id.* at 44).

AirTouch Cellular also criticizes Cellnet for recalculating access revenues for 1994 to 1997 by using the average number of subscribers rather than the number of directories. AirTouch Cellular relies on the testimony of Ms. Martin as the basis for why directories is the more appropriate factor for the purpose of performing the access charge calculation (AirTouch Initial Br. at 44, 45).

With respect to any allegations pertaining to Section 4905.33, Revised Code, AirTouch Cellular states that there must be an affirmative showing that the alleged subsidy occurred for the purpose of destroying competition. The respondent points to the fact that there could not have been a contemporaneous intent to price below cost since the domestic public land mobile radio service (DPLMRS) reports providing a comparison of the wholesale and retail accounting were not completed until the end of the year. Further, AirTouch Cellular focuses on the fact that Cellnet, itself, has argued that the AirTouch Cellular pricing personnel were unaware of the need for segmented accounting practices. Finally, when attempting to be competitive in the retail market, AirTouch Cellular represents that it responds appropriately, taking into

consideration the costs of providing and selling service (*Id.* at 47-49).

(a) Ruling: Count IV — Allegations Relative to AirTouch Cellular

With respect to Cellnet's allegations regarding cross-subsidization, the Commission notes that, consistent with its discussion of Count II of this Opinion and Order, it has already addressed those claims related to the failure to account for 100 percent of the airtime and access charges; the failure to account for all promotional, concession, and allowance minutes; and the failure to account for all access charges. Similarly, the Commission previously addressed the inappropriateness of AirTouch Cellular's restated accounting. A natural consequence of this conduct is the fact that AirTouch Cellular wholesale has subsidized AirTouch Cellular retail operations by not charging it for all of the minutes of cellular service provided. In doing so, AirTouch Cellular has violated the prohibitions established in the 84-944 and 89-563 orders requiring that affiliated reseller have no involvement whatsoever in the wholesale operations of the underlying carrier (84-944 Order at 10; 89-563 Entry on Rehearing at 5).

With respect to the Cellnet's allegations regarding the appropriateness of AirTouch Cellular's methodology for the allocation of expenses and the calculation of recurring access charges, as discussed above, the Commission does not believe that it is in the appropriate position to render such a decision on these issues. The Commission finds that, based on the analysis stated in this Opinion and Order, these matters do not need to be addressed for the purpose of determining whether AirTouch Cellular subsidizes its retail operations with wholesale profits for the purpose of destroying competition.

While the Commission finds that AirTouch Cellular has engaged in discriminatory conduct, this conclusion does not

equate with a finding that AirTouch Cellular has actively pursued the destruction of competition. As stated above, in order to meet its burden of proof relative to allegations of destroying competition, the complainant must establish something beyond the mere demonstration of discrimination. To this end, Cellnet has not presented sufficient evidence to satisfy its burden of proof. As reflected by the record AirTouch Cellular has continuously provided Cellnet with service commencing in July 1991 (Tr. IV, 42). Over this time frame, AirTouch Cellular has extended service to Cellnet pursuant to a number of plans. In addition, the Commission notes that AirTouch Cellular stated that the number of resellers reselling AirTouch Cellular wholesale service has increased from just two in 1993 to thirteen in 1998 (Tr. VIII, 14, 15). Such facts do not support the allegations that AirTouch Cellular actively pursued the opportunity to destroy competition.

To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and Order, they are denied.

E. Count V — Exclusion From Retail Plans

1. Cellnet Relative to Ameritech Mobile (Count V)

Cellnet alleges that, inasmuch as Ameritech Mobile failed to properly separate its wholesale and retail operations as provided under the 84-944 and 89-563 orders, Ameritech Mobile retail operations are also subject to the applicable provisions of Sections 4905.33 and 4905.35, Revised Code, as well as the applicable terms and conditions of the 84-944 and 89-563 orders. Consequently, Cellnet believes it should have the right to take service under the same terms and conditions as offered to a retail customer (Cellnet Initial Br. to Ameritech at 37-39). In the alternative, Cellnet states that if the 84-944 and 89-563 determinations are ultimately found to be invalid due to procedural deficiencies, Ameritech Mobile retail operations

should still be subject to the provisions of Title 49, Revised Code. In addition, Ameritech Mobile's wholesale rates should be found to be unlawful due to violations of Sections 4905.33 and 4905.35, Revised Code (Cellnet Reply Br. to Ameritech at 13, 14). Cellnet contends that, despite being the largest independent cellular customer in Ohio, Cellnet was never offered rates as good as those offered to much smaller customers of Ameritech Mobile retail affiliates. Cellnet relies on a comparison in Cellnet Exhibits 4 and 6 in order to substantiate its allegations of improper offering of special rates (Cellnet Initial Br. to Ameritech at 37, 38).

In support of its allegations pursuant to this count, Cellnet alleges that Ameritech Mobile retail discriminated against Cellnet by repeatedly offering low-priced government rate plans to nongovernment entities, while not offering the same to Cellnet. Cellnet objects to Ameritech Mobile's alleged practice of classifying a perspective customer as a governmental entity for the purpose of providing a lower rate (Cellnet Reply Br. to Ameritech at 14, 15). As examples of this alleged offering of government rate plans to nongovernment entities, Cellnet points to the record testimony related to Lane Aviation, Divine Incorporated, Baker and Henning, and Burman and Robinson. In support of its arguments, Cellnet compared Cellnet Exhibit 4 to Cellnet Exhibits 10, 35, and 36. Cellnet asserts that excluding Cellnet from these government rates was prejudicial since the absence of an access charge and low airtime rates would have been appealing to Cellnet's customers (Cellnet Initial Br. to Ameritech at 39-45; Cellnet Reply Br. to Ameritech at 16).

As further evidence of Cellnet's allegations regarding Ameritech Mobile's discrimination in favor of its retail operations, Cellnet contends that Ameritech Mobile was to bill it in full minute increments, while Ameritech Mobile's retail customers were billed in tenth of a minute increments.

Therefore, Cellnet alleges that Ameritech Mobile's billing practices created a preferential rate and undue preference in violation of Sections 4905.33 and 4905.35, Revised Code (Cellnet Initial Br. to Ameritech at 45).

Further, Cellnet believes that Ameritech Mobile discriminated against it by offering more advantageous tiers regardless of actual volume. These allegations are based on Cellnet's comparison of the required volume corresponding to the tiers in the wholesale AMBC rate plan to the actual rates provided to smaller volume users (*Id.* at 46).

2. Ameritech Reply (Count V)

Ameritech Mobile contends that a commitment of higher usage justifies a lower price. Ameritech Mobile believes that the record supports the theory that different customers are entitled to different rates based upon usage and other reasonable pricing considerations (Ameritech Initial Br. at 26). Ameritech Mobile cites to the Commission's determination in Case No. 97-876-EL-CSS, *In the Matter of Mark R. Weiss v. The Cleveland Electric Illuminating Company*, in support of Commission precedent for differential pricing.

In response to Cellnet's arguments regarding discrimination related to the billing intervals provided to it in comparison to those offered other customers, Ameritech Mobile states that the Lane Aviation contract is a special government contract, the terms of which are not appropriate for Cellnet's utilization (Ameritech Reply Br. at 38). Ameritech Mobile believes that Cellnet ultimately desires the ability to receive a wholesale discount on Ameritech Mobile retail's special rate plans (i.e., Franklin County plan) (*Id.* at 10).

Consistent with the requirements of 89-563, Ameritech Mobile represents that it provides access to cellular service pursuant to terms, conditions, and prices that are universally

available on a nondiscriminatory basis to all customers (Ameritech Initial Br. at 46). At the same time, Ameritech Mobile acknowledges that it has, from time to time, priced services differently based upon reasonable, competitively driven considerations. Ameritech Mobile highlights the fact that Cellnet itself has acknowledged offering special rate plans to customers based on competitive circumstances.

An example of this competitive response, Ameritech Mobile points to the Franklin County plan that was developed to provide service to the county government and its affiliates (*Id.* at 17). As further justification for the Franklin County plan, Ameritech Mobile references Section 4905.34, Revised Code, which it believes permits a public utility to grant reduced rates to governmental entities, such as states or any political subdivision. Finally, Ameritech Mobile references Section 4905.31, Revised Code, which, Ameritech Mobile opines, allows public utilities to enter into special rates based on reasonable considerations (*Id.* at 18; Ameritech Reply Br. at 35).

Ameritech Mobile asserts that Lane Aviation was entitled to the Franklin County plan due to the fact that it works with and for the Columbus Municipal Airport Authority and supports the functions at the Port Columbus Airport (Ameritech Initial Br. at 19). Pursuant to the Franklin County plan, Franklin County is ultimately responsible for the provided service to its affiliates.[75] Specific to the Franklin County plan, Ameritech Mobile contends that, due to the special statutory treatment of governmental service agreements, Cellnet is not entitled to the prices offered pursuant to these plans (*Id.* at 21). Ameritech Mobile goes on to contend that, while it attempts to insure that only qualified individuals are extended special rate plans, there

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[75] No evidence was provided to indicate that Franklin County was aware of this assumption.

is no Commission rule that prohibits a government rate plan from being offered to a nongovernmental person or entity (Ameritech Reply Br. at 36).

(a) Ruling: Count V — Allegations Relative to Ameritech Mobile

In Count V of its complaint, Cellnet alleges that Ameritech Mobile has offered certain rate plans to retail customers, including but not limited to "corporate" or "association" plans and that the rates charged pursuant to these plans are below the rates that are made available to Cellnet. The complainant believes that Sections 4905.33 and 4905.35, Revised Code, apply to Ameritech Mobile retail because Ameritech Mobile has failed to comply with the conditions necessary for the deregulation of its retail affiliate under the 84-944 and 89-563 orders (Cellnet Reply Br. to Ameritech Mobile at 37).

Cellnet is correct in its assertions that, inasmuch as Ameritech Mobile has failed to comply with the separation provision stated in the 84-944 and 89-563 orders, *supra*, Ameritech Mobile retail operations were not entitled to any relief from jurisdiction. To this end, to the extent that retail services would have been regulated, Cellnet should have been entitled to avail itself of any Ameritech Mobile retail offerings, during the specific time frames, for which it qualified in accordance to any pertinent service-related terms and conditions. Therefore, to the extent that Ameritech Mobile did not extend retail offering, during the specific time frames, to Cellnet for which it would have qualified, Ameritech Mobile is in violation of the Commission's 84-944 and 89-563 orders, as well as Sections 4905.33 and 4905.35, Revised Code.

The Commission concludes that the majority of Cellnet's allegations related to this count of the complaint concern the practices of Ameritech Mobile's retail affiliate. As already determined in our earlier discussion, Ameritech Mobile

wholesale has provided free service to Ameritech Mobile retail. Under the regulatory framework in existence for the time frame covered by this complaint, the practice of Ameritech Mobile pricing its retail services below that offered to Cellnet at wholesale, absent any records to justify such difference in pricing, supports a finding of a violation of Sections 4905.33 and 4905.35, Revised Code. Due to the absence of any records reflecting the terms and conditions that Ameritech Mobile retail may have purchased service from Ameritech Mobile wholesale, the Commission must assume that Ameritech Mobile's retail affiliate is no better situated than Cellnet as a wholesale customer. Therefore, the Commission need to look no further than a comparison of the face value of the rates under which Cellnet is receiving service on a wholesale basis relative to the rates under which Ameritech Mobile is offering service at retail in order to consider the allegations raised in this complaint.

The Commission certainly recognizes that, pursuant to Section 4905.34, Revised Code, Ameritech Mobile may offer reduced rates or free service to governmental entities. Specific to the allegations of Count V, the Commission is specifically limiting its analysis to Ameritech Mobile's offering of retail service to those end users who are clearly nongovernmental entities. In particular, the Commission relies on the testimony of Mr. Benardo Fernandez, Jr., relative to the 1997 offering of governmental rate plans to entities such as Divine Inc. (Cellnet Ex. 35), Baker Henning Productions (Cellnet Ex. 36), Burman Robinson (Cellnet Ex. 37), and Cindy Stoll (Cellnet Ex. 38) (Tr. II, 31-44, 72).[76] In each of these cases, the Commission finds that Ameritech Mobile retail offered retail service at rates which were lower than those extended to Cellnet at a wholesale

[76] No evidence was provided to indicate that Franklin County was aware of this assumption. Based on the existence of these other contracts, the Commission finds it unnecessary to specifically determine the appropriateness of Lane Aviation availing itself of the Franklin County plan.

level. The application of governmental contracts for nongovernmental retail entities ultimately conflicts with the Commission recognition that "permitting persons other than just the licensees to package and market use of the cellular spectrum space may maximize its potential societal benefits beyond those to be attained solely through the efforts of the licensees" (89-563 Finding and Order at 22). Through the offering of such discounted affiliated retail service pursuant to more preferable rates, terms, and conditions than that offered at wholesale, cellular resale cannot serve as a viable alternative as intended by the 84-944 and 89-563 orders. This concern is even more significant in an environment in which Ameritech Mobile has failed to properly maintain its records as required by the Commission.

Therefore, with respect to this count of the complaint, to extent that Cellnet intended its allegations in Count V to signify that in 1995-1998, Ameritech Mobile acted in a discriminatory manner towards Cellnet thereby violating the Commission's 84-944 and 89-563 orders, as well as Sections 4905.33 and 4905.35, Revised Code,[77] the Commission finds in Cellnet's favor.

To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and Order, they are denied.

3. Cellnet Relative to AirTouch Cellular (Count V)

Cellnet believes that, based on its arguments summarized above, it has demonstrated that AirTouch Cellular did not properly separate its wholesale and retail operations. Due to the failure to maintain the appropriate separation, Cellnet concludes that AirTouch Cellular retail operations must,

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[77] Allegations pertaining to Section 4905.22, Revised Code, are addressed in the discussion related to Count IX, *infra*.

therefore, fall under the jurisdiction of the Commission, including for the purposes of applying Sections 4905.33 and 4905.35, Revised Code, as well as the 84-944 and 89-563 orders (Cellnet Initial Br. at 107, 108). Consistent with this belief, Cellnet assumes that, at least up until August 1995, the only rate which AirTouch Cellular could charge its end users are those which would have been properly approved by the Commission pursuant to Section 4909.17, Revised Code (Cellnet Reply Br. at 46).

For the purpose of this count, Cellnet focuses on its belief that, pursuant to the 89-563 Order and Entry on Rehearing, Appendix A at 15-16, AirTouch Cellular cannot offer services to its own retail operations under terms and provisions that are more favorable than those offered to Cellnet. Based on the arguments discussed above, Cellnet contends that AirTouch Cellular retail received service from AirTouch Cellular wholesale at rates that were lower than those received by Cellnet. Cellnet asserts that these rates were so much lower that AirTouch Cellular retail was able to offer rates to end users which were lower than those offered to Cellnet at wholesale. Cellnet believes that this result supports its contention that AirTouch Cellular intended to destroy competition through its alleged acts of cross-subsidization (Cellnet Initial Br. at 108).

(a) Resale Purchase Pursuant to Retail Plans

As evidenced by Cellnet Exhibit 233, dated October 1996, and Cellnet Exhibit 215, dated March 1997, Cellnet represents that it was AirTouch Cellular's policy to prohibit the resale of retail rate plans. Therefore, Cellnet asserts that it was unable to purchase wholesale service under the same terms and conditions as offered by AirTouch Cellular at retail (*Id.* at 110).

To further frustrate its ability to purchase service pursuant to AirTouch Cellular retail plans, Cellnet alleges that AirTouch Cellular refused to provide it with the means to rebill or resell

service. Specifically, Cellnet provides that AirTouch Cellular would not provide Cellnet with a functional reseller billing tape in the event that Cellnet purchased service pursuant to a retail plan (*Id.* at 110). Cellnet asserts that it is technically feasible for a reseller tape to be provided to Cellnet under the scenario in which Cellnet purchases service pursuant to a retail plan (*Id.* at 111, 112).

Cellnet contends that, even when it requested retail plans in the absence of a reseller tape, it was still refused service, based on the argument that Cellnet was not similarly situated to the retail customer in question (*Id.* at 114). Cellnet rejects such rationale inasmuch as Cellnet is AirTouch Cellular's largest customer and it is less costly to provide service to a wholesale customer than to a retail customer (*Id.* at 115). Based on the aforementioned reasons, Cellnet concludes that AirTouch Cellular's refusal to provide reseller tapes is simply due to its reluctance to allow Cellnet to purchase service pursuant to more preferable terms and conditions of the retail plans than those offered on a wholesale basis (*Id.* at 112-114). Based on the above allegations, Cellnet believes that AirTouch Cellular subjected it to undue prejudice and disadvantage in violation of Sections 4905.33 and 4905.35, Revised Code.

(b) Government, Association, and Corporate Rate Plans

As further evidence of its alleged discrimination, Cellnet alleges that from 1991 to the present, AirTouch Cellular retail offered through government, association, and corporate rate plans, special lower rates than those offered to Cellnet (*Id.* at 116-118, 120, 122, 125-127). As an example, Cellnet identified the fact that, in 1992, although Cellnet had over 5,000 customers, the Ohio Association of Realtors received more attractive overall rates, term, and conditions (*Id.* at 120; Cellnet Exs. 106, 107). Other plans identified by Cellnet include Ohio

Bell Communications (Cellnet Exs. 109, 188) in the 1993 time frame and the Corporate Advantage plans (Cellnet Exs. 141, 184, 188) for the 1994 time frame.

Cellnet further alleges that low volume subscribers were offered discounted retail rates below Cellnet's wholesale rates despite the fact that they were not eligible for these rate plans (*Id.* at 116-118, 124, 128). Specific to this point, Cellnet references, among others, the rates offered to John Massimiani (1996), Christine Hornyak (1997), The Kassouf Company (1996), Interstate Lift Trucks (1997), Coonfore Insurance (1997), and Norwest Mortgage et al. (1997) (Cellnet Exs. 131-139, 181, 188, 220, 222).

(c) Concessions

Cellnet asserts that from 1991-1998, AirTouch Cellular wholesale discriminated against Cellnet by providing concessions to AirTouch Cellular retail, thus lowering the retail rate below the rates offered to Cellnet. These concessions included free features, free recurring credits, free airtime, and free phones (Cellnet Initial Br. at 135). Cellnet asserts that these concessions violate both Sections 4905.33 and 4905.35, Revised Code, since they signify a special rate, as well as an undue preference (*Id.* at 135, 136).

(d) Roaming

In regard to roaming charges,[78] Cellnet states that, since it began operating, AirTouch Cellular has billed Cellnet for all of its customers roaming minutes and that these minutes were billed at a higher rate than those charged to AirTouch Cellular retail customers with comparable usage (*Id.* at 131). Specifically, Cellnet contends that, based on a comparison of

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[78] Those charges that are assessed when a cellular phone is being used by a retail end user in a geographical location other than the home region of that end user customer.

Cellnet Exhibits 235 and 236, AirTouch Cellular established a higher rate tier for the first minute of all reseller roaming on a per line basis when compared to AirTouch Cellular retail's roaming charges (*Id.* at 131-133).

(e) Free Nights and Weekends

Cellnet alleges that for 1997 (at least through November 24, 1997), AirTouch Cellular discriminated against it by prohibiting the purchase of unlimited night and weekend packages offered to AirTouch Cellular retail (*Id.* at 134). At the same time, Cellnet alleges that AirTouch Cellular retail aggressively marketed free nights and weekends to its customers. Therefore, Cellnet contends that the unlimited nights and weekend package signified a special rate that provided undue preference or advantage.

(f) Ohio Revised Code

Cellnet submits that AirTouch Cellular has violated Section 4905.33, Revised Code, by charging Cellnet a greater rate than that charged by AirTouch Cellular retail for "a like and contemporaneous service under substantially the same circumstances and conditions" (Cellnet Reply Br. to AirTouch at 47). Cellnet opines that, in pursuing this claim pursuant to Section 4905.33, Revised Code, there is no requirement to establish any intentional motives of the alleged company (*Id.* at 47).

Specific to the issue of "similarly situated customers," Cellnet avers that the Ohio Supreme Court has previously held that distinctions in pricing to different customers must reflect the costs of serving those customers (*Id.* at 47). Cellnet insists that although there is no difference in the nature of the cellular service provided to Cellnet and AirTouch Cellular retail customers, there is a cost difference due to the fact that it is less expensive to serve Cellnet, due to the absence of AirTouch

Cellular's responsibility for customer care and billing (*Id.* at 49). Cellnet concludes that permitting exceptions to Section 4905.33, Revised Code, under the guise of competitive offerings would negate any practical application of this statutory section. Cellnet also emphasizes that in many cases the record is void of evidence that AirTouch Cellular retail was truly making an offer in response to a bona fide competitive proposal (*Id.* at 49, 50). Finally, Cellnet argues that even if competitive factors served as an appropriate exception to the prohibitions of Section 4905.33, Revised Code, AirTouch Cellular's retail policies lacked appropriate safeguards to allow for this practice (*Id.* at 51).

In addition, Cellnet alleges that AirTouch Cellular has violated Section 4905.35, Revised Code, which prohibits AirTouch Cellular from subjecting Cellnet to undue prejudice and discrimination. Cellnet represents that it is AirTouch Cellular's largest customer, while at the same time, one of the least costly customers due to the fact that it is a customer at the wholesale level (*Id.* at 47).

4. AirTouch Cellular Response (Count V)

AirTouch Cellular objects to the Commission's consideration of these allegations on the basis that, as of August 1994, state commissions have been preempted from regulating cellular rates and may only hear complaint proceedings that concern carrier practices separate and apart from rates. AirTouch Cellular also claims that Cellnet has failed to meet its burden of demonstrating that AirTouch Cellular discriminates against it by offering better rates to similarly situated customers absent any rational basis (AirTouch Initial Br. at 49).

Based on its interpretation of Commission precedent, AirTouch Cellular states that it may charge Cellnet different rates based on reasonable consideration. Therefore, AirTouch Cellular opines that, in order to prevail on these allegations,

Cellnet must establish that it was similarly situated to another customer and that there is no reasonable justification for the difference in treatment (*Id.* at 50, 51).

(a) Resale of Retail Plans

Specific to Cellnet's allegations regarding the offering of retail plans to resellers, AirTouch Cellular states that resellers, beginning in November 19, 1996, had the option of purchasing service pursuant to retail rate plans, as evidenced by Cellnet Exhibit 114. As a result, AirTouch Cellular believes that Cellnet was capable of selecting specific retail plans for the purpose of availing itself of comparable equipment, roaming rates etc. (*Id.* at 53). While acknowledging that Cellnet Exhibit 215 may have been issued in error, AirTouch Cellular represents that, subsequent to October 1996, its retail contracts no longer prohibited the resale of retail contracts (AirTouch Reply Br. at 46).

AirTouch Cellular also relies on Cellnet's representation that prior to 1996, it was always able to negotiate wholesale rate plans that were below the rates offered at retail (Tr. IV, 232-234; AirTouch Initial Br. at 53). AirTouch Cellular believes that Cellnet is simply seeking to cherry-pick the various AirTouch Cellular rate plans to design its own customized deal. For example, AirTouch Cellular calls attention to the fact that, although Cellnet can avail itself of a specific AirTouch Cellular retail plan, Cellnet seeks to enhance the terms and conditions of the plan by requesting a reseller billing tape as well (AirTouch Initial Br. at 54).

(b) Billing

AirTouch Cellular identifies the fact that, at the end of a billing cycle, the company produces two types of billing tapes; a customized reseller billing tape and a major accounts billing exchange logistical record (MABEL tape). Resellers can

receive both the customized reseller billing tape and the MABEL tape, while end user customers receive only the MABEL tape (Tr. IX, 20-25). The reseller billing tape contains "the basic call record," including information such as the number of the cellular subscriber, the number called to, the termination point, the actual date and time of the call, and the switch used. The MABEL tape contains call record information, as well as information at an account level, including taxes, features and equipment charges (*Id.* at 23, 24). AirTouch Cellular represents that a MABEL tape contains the requisite call detail information and, AirTouch Cellular, therefore, infers that a reseller can rebill from a MABEL tape when purchasing a retail service (*Id.* at 20-25; AirTouch Reply Br. at 47). While AirTouch Cellular acknowledges that it is possible for its billing system to produce a reseller tape in conjunction with a retail service, it is time consuming, labor intensive, and not very effective. Therefore, it is not AirTouch Cellular's practice to produce such tapes (Tr. X, 28-30). Further, AirTouch Cellular insists that it is under no legal obligation to provide any customized billing services as requested by Cellnet (AirTouch Reply Br. at 47).

(c) Concessions

AirTouch Cellular emphasizes that market forces, and not traditional utility regulation, should dictate how cellular providers price, market, and sell their service (*Id.* at 1). AirTouch Cellular admits that it has offered existing and new subscribers rates that are lower than those advertised in its current retail and wholesale rate plans (AirTouch Initial Br. at 57). These concessions are utilized to either prevent an existing customer from going to a competitor or convince a prospective customer to choose AirTouch Cellular's service over a competitor. AirTouch Cellular insists that Ohio retail consumers have benefited from its pricing policies (AirTouch Reply Br. at 2). AirTouch Cellular opines that Ohio consumers

and the objectives of Section 4927.02, Revised Code, will be harmed if the Commission grants the relief requested in this case and prohibits the use of competitive offers (*Id.* at 8).

At the same time, AirTouch Cellular insists that concessions are not the norm, but rather generally represent about one or two percent of AirTouch Cellular retail sales (AirTouch Initial Br. at 58). AirTouch Cellular believes that concessions are critical in competitive situations (*Id.* at 60). Further, AirTouch Cellular provides that it controls the use of concessions through the existence of stated guidelines and a retrospective review (*Id.* at 58, 59, 63).

Contrary to Cellnet's allegations that it is similarly situated to other high volume customers who received concessions, AirTouch Cellular distinguishes Cellnet from the examples presented on the record. In particular, AirTouch Cellular claims that Cellnet has never requested a concession in the context of threatening to take its business to a competitor. In addition, AirTouch Cellular describes that factors, such as the status of a customer's account and payment history, need to considered when determining if a customer is similarly situated (AirTouch Reply Br. at 48, 49).

(d) Roaming

AirTouch Cellular denies Cellnet's claims of alleged discrimination relative to roaming charges. AirTouch Cellular explains that the isolated comparison of roaming rates offered via retail and reseller plans is misleading inasmuch as one needs to look at the totality of all the rates offered under a plan, including roaming, airtime, and access (*Id.* at 50). AirTouch Cellular further explains that the difference in the rate tiers between the roamer wholesale and retail plans was a result of Cellnet's request for a different reseller rate structure which more closely resembled that which existed prior to the

introduction of the banded rate structure.[79] AirTouch Cellular represents that the only reason why the roaming retail rates differ from the wholesale rates is due to the fact that Cellnet requested a rate change in order to better approximate the overall roaming cost which existed prior to the banded roaming plan (Tr. X, 72; AirTouch Reply Br. at 50).

(i) Ruling: Count V — Allegations Relative to AirTouch Cellular

As discussed in our ruling with respect to Count V relative to the allegations raised against Ameritech Mobile, Cellnet is correct in its assertions that, inasmuch as AirTouch Cellular has failed to comply with the 84-944 and 89-563 orders, AirTouch Cellular retail operations were not entitled to any relief from jurisdiction. To this end, to the extent that retail services would have been regulated, Cellnet should have been entitled to avail itself of any AirTouch Cellular retail offering, during the relevant time frames, for which it qualified in accordance with any pertinent service-related terms and conditions.

As previously discussed in our ruling relative to Count V of the allegations pertaining to Ameritech Mobile, absent transactional records as contemplated by 89-563, to substantiate the difference in pricing, the practice of pricing AirTouch Cellular retail service below that offered to Cellnet on a wholesale basis is a violation of Sections 4905.33 and 4905.35, Revised Code. Due to AirTouch Cellular's failure to maintain records relative to transactions between its wholesale and retail affiliates, and in the absence of contemporaneous accounting

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[79] The banded rate structure provides four bands for a given home market with the rates increasing as one moves away from their home market. In addition to the bands, AirTouch Cellular wholesale offered three designations of service (neighbor, traveler, and explorer). The designation of service selected determined the number of bands for which a customer would receive their home rate (Tr. X, 71).

records which establish otherwise, the Commission has no choice but to assume that AirTouch Cellular retail and Cellnet are similarly situated. Therefore, the Commission need look no further than a comparison of the face value of the rates under which Cellnet is receiving service on a wholesale basis to the rates under which AirTouch Cellular is offering service at retail.[80]

To this end, the Commission finds that AirTouch Cellular itself acknowledges that its retail rates have been below the wholesale rate offered to Cellnet (AirTouch Initial Br. at 57). While AirTouch Cellular insists that many of the retail concessions were provided as a result of competitive pressures, the Commission specifically finds that, regardless of competitive pressures, it was inappropriate for AirTouch Cellular to have extended association or government plans to individuals who were not eligible for these rate plans (Tr. XII, 14). Relative to this point, the Commission notes that AirTouch Cellular had no written guidelines regarding the determination of a government entity (Tr. VII, 99, 100). Further, although AirTouch Cellular believes that it maintained appropriate controls over its use of concessions, the record clearly demonstrates that these were subjectively applied (Tr. XII, 65, 66). Related to this point, the Commission notes that the company failed to maintain written concession guidelines until 1998 (Tr. VIII, 81). Despite AirTouch Cellular's representations to the contrary, it is apparent that, until the time that Mr. Fernadez began assisting Cellnet in this complaint, AirTouch Cellular management condoned the practice of providing unsubstantiated retail discounts from January-April 1997 (Tr. XII, 58, 65, 66). In addition, although AirTouch Cellular contends that its actions were motivated by

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[80] This determination would include the retail offering of free nights and weekends in 1997, while not extending this promotion to nonaffiliated wholesale customers.

competitive pressures, the Commission notes that, at least in some cases, the retail customers were already under existing contracts with AirTouch Cellular and, therefore, were not a threat to go to a competitor (Tr. XII, 11, 19, 26; Cellnet Ex. 5, at 220, 221).

With respect to Cellnet's allegations regarding discrimination between wholesale and retail roaming rates, while AirTouch Cellular explains that although, beginning in 1995, it instituted a banded roaming program, the program was modified for resellers in order to ensure that it was cost neutral for Cellnet and basically allowed for the continuation of the pass through of roaming charges by the provisioning carrier (Tr. X, 75). This contention fails to address the allegations that the AirTouch Cellular retail roaming rates were lower than those charged to Cellnet. Specifically, the Commission notes that AirTouch Cellular acknowledged that while, on average, the rates of AirTouch Cellular's retail customers decreased as a result of banded roaming, the rates charged to Cellnet stayed about the same (*Id.* at 84). Therefore, it appears as though AirTouch Cellular continued to pass through roaming charges to Cellnet while not continuing to pass through the entire amount to AirTouch Cellular's retail affiliate.

In regard to Cellnet's allegations relative to AirTouch Cellular's unwillingness to provide reseller tapes for services purchased pursuant to resold retail plans, beginning in 1996, the Commission notes that while the record reflects that MABEL tapes are available to resellers, it is unclear as whether these tapes can be successfully utilized for rebilling Cellnet's customers (Tr. IX, 20-25). Therefore, the Commission is unable to reach a determination relative to this issue.

As a result, the offering of affiliated retail service below the nonaffiliated wholesale cost, absent a clear demonstration of equitable pricing practices, can only lead to the conclusion that

either AirTouch Cellular's retail arm is purchasing service at a rate lower[81] than Cellnet and/or AirTouch Cellular's wholesale arm is subsidizing its retail affiliate. In either case, a violation of the 84-944 and 89-563 orders, as well as Sections 4905.33 and 4905.35, Revised Code, will have occurred. To permit this conduct, in the absence of any justifiable explanation, would obviate the Commission's prior recognition that "permitting persons other than just the licensees to package and market use of cellular spectrum space may maximize its potential societal benefits beyond those to be attained solely through the efforts of the licensees (89-563 Finding and Order at 22).

Despite AirTouch Cellular's contentions to the contrary, the Commission has never intended to prohibit AirTouch Cellular from responding to competitive pressures. Rather, due to the unique nature of the cellular market with both a wholesale and retail operations, through its issuance of the 84-944 and 89-563 orders, the Commission's focus was to ensure the opportunity for the existence of both affiliated and nonaffiliated retail arms due to the limited availability of wholesale providers. Therefore, while affiliated retail arms could respond to competitive pressures, they were required to do so pursuant to specific parameters in order to satisfy the Commission's stated concerns relative to the shortage of wholesale providers. Most notably was the condition that the affiliated reseller not receive service pursuant to prices, terms and conditions different than those available to nonaffiliated resale providers. In short, retail market pressures should not have affected or influenced the wholesale market. Although AirTouch Cellular contends that, due to the competitive cellular market, it was entitled to significant freedoms, it continued to remain accountable to the previously stated regulatory requirements until further ordered by the Commission.

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[81] This issue is discussed in Count II.

To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and Order, they are denied.

F. Count VI — AirTouch Cellular Wholesale Has Violated the Commission's Orders, as well as Other Ohio Law, By Charging its Affiliated Retail Operations a More Favorable Rate for Roaming Than it Charged Cellnet

1. Cellnet Relative to AirTouch Cellular (Count VI)

With respect to roaming, Cellnet provides that, pursuant to its holding in *In the Matter of the Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 FCC Rcd. 7842 (1095), the FCC has specifically stated that Ohio retains jurisdiction over roaming agreements provided that such review does not directly affect end user rates (Cellnet Reply Br. to AirTouch at 52).

Cellnet alleges that since it began operating, AirTouch Cellular wholesale has billed Cellnet for all of its customers roaming minutes; however, AirTouch Cellular wholesale has failed to bill AirTouch Cellular retail for its customers' roaming usage.[82] As support for this contention, Cellnet states that, based on Cellnet Exhibit 103 (specifically, the original nonrestated accounting) and Exhibit 188, it is evident that, while Cellnet was charged for all of its roaming minutes, AirTouch Cellular wholesale did not charge its affiliated retail arm for any roaming minutes in 1995-1997 (Tr. VI, 62, 85, 86; Cellnet Initial Br. to AirTouch at 137-140). By not originally charging AirTouch Cellular retail for roaming in 1997, Cellnet alleges that AirTouch Cellular wholesale has violated the 89-563 requirement that rates and terms for services provided to affiliated retail operations can be no more favorable than those

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[82] These allegations are based on a comparison of Cellnet Exs. 103 and 219.

that AirTouch Cellular wholesale makes available to any nonaffiliated providers of functionally similar services and equipment (*Id.* at 138, 139).Cellnet also provided a similar analysis and argument relative to the 1991-1996 roaming charges (*Id.* at 139, 140). Cellnet believes that its argument is substantiated by the sudden inclusion of roaming charges to AirTouch Cellular retail in the restated accounting for 1995-1997 (*Id.* at 137, 139, 140).

2. AirTouch Cellular (Count VI)

AirTouch Cellular rejects any allegation that AirTouch Cellular retail was not charged for roaming. In support of this belief, AirTouch Cellular states that the original Wholesale Tax Reports for 1991-1997 all were premised on the belief that any accounting for foreign roaming included both affiliated and nonaffiliated roaming. Therefore, according to AirTouch Cellular, AirTouch Cellular retail was properly charged for roaming services for the years in question (AirTouch Reply Br. at 52).

Although AirTouch Cellular recognizes that resellers may have been charged a higher roaming rate than that available in some retail rate plans, it contends that resellers were also paying lower access charges pursuant to the associated rate plans (*Id.* at 50).

(a) Ruling: Count VI — Allegations Relative to Roaming Service Discrimination

The Commission agrees with Cellnet that, based on the unrestated accounting for 1991-1997, AirTouch Cellular failed to allocate any charge to its retail affiliate for roaming (Cellnet Ex. 103). This conclusion is supported by AirTouch Cellular's admission that the roaming charges from AirTouch Cellular wholesale to AirTouch Cellular retail do not appear in the original accounting, but only in the restated accounting (Tr. VI,

117-119). While the restated accounting for 1995-1997 reflects a designation for "roaming activity purchased from wholesale," no such designation is denoted in the original accounting for these years (Cellnet Exhibit 103, AT-0002046, AT-0002059, AT-0002343). Finally, AirTouch Cellular has failed to maintain records of roaming transactions, as required by the 89-563 Order, supporting its contentions relative to roaming charges. Therefore, with respect to 1991-1997, AirTouch Cellular has discriminated against Cellnet by failing to reflect a charge to AirTouch Cellular retail for roaming service while charging Cellnet for roaming service as reflected by Cellnet Exhibit 219.

To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and Order, they are denied.

G. Count IX — Ameritech Mobile has Denied Wholesale Service to Cellnet From 1993 to Present.

1. Cellnet Relative to Ameritech Mobile (Count IX)

Cellnet contends that Ameritech Mobile wholesale is in violation of Section 4905.22, Revised Code, by failing to furnish necessary and adequate service at rates which are just, reasonable, and not more than the charges allowed by law or by order of the Commission. Specifically, Cellnet asserts that, from 1993 to 1995, Ameritech Mobile denied service to Cellnet by refusing to offer Cellnet any rates, despite Cellnet's continued efforts to obtain service (Cellnet Initial Br. Relative to Ameritech Mobile at 46). Cellnet alleges that from 1993-1995, Ameritech Mobile's conduct signified a failure to provide necessary and adequate service. Furthermore, Cellnet alleges that Ameritech Mobile wholesale has violated Sections 4905.33 and 4905.35, Revised Code, as a result of Ameritech Mobile wholesale offering a special rate or the extension of undue preference to Ameritech Mobile retail during this time frame (*Id.* at 50).

Although Cellnet acknowledges that, Ameritech Mobile wholesale ultimately offered rates to Cellnet on September 8, 1995, and March 12, 1998, Cellnet asserts that these rates were so excessive that they, in essence, impeded Cellnet's ability to serve as a reseller of Ameritech Mobile wholesale's service. Further, Cellnet alleges that Ameritech Mobile retail rates for its 50 largest corporate accounts were derived pursuant to the same pricing matrix as extended to Cellnet. Due to this pricing structure, Cellnet alleges that it was excluded from being able to compete in this sector of the market (*Id.* at 51). Similarly, Cellnet states that it was unable to compete for consumer accounts because the rates offered to Cellnet were higher than those available in the marketplace based on the same level of usage (*Id.* at 51). Cellnet alleges that, by pricing its nonaffiliated wholesale rates at levels equal or greater to those offered at retail, Ameritech Mobile wholesale has constructively denied service to Cellnet (*Id.* at 52).

2. Ameritech Mobile Reply (Count IX)

Ameritech Mobile contends that, since its initial encounter, it has not refused to do business with Cellnet. Rather, it is Cellnet which has refused to accept the pricing, terms, and conditions offered by Ameritech Mobile (Ameritech Initial Br. at 26, 27). Ameritech Mobile concludes that Cellnet is simply unhappy with the terms and conditions offered by Ameritech Mobile's wholesale (*Id.* at 4, 5).

In particular, Ameritech Mobile identifies the fact that, as acknowledged by Mr. Tricarichi, Ameritech Mobile had a tariff on file with the Commission for wholesale services as early as 1993 (Ameritech Mobile Reply Br. at 41). With respect to the Ameritech Mobile's first contract offer to Cellnet following the filing of this complaint, although Ameritech Mobile acknowledges that no rates were incorporated in the proposed contract, Ameritech Mobile contends this was simply a result

of a clerical error (*Id.* at 41). Ameritech Mobile remarks that the true issue at hand is Cellnet's unhappiness regarding the terms and conditions offered to it and its true desire to pursue damages (*Id.* at 40, 45). With respect to Cellnet's alleged inability to meet with Ameritech Mobile's wholesale affiliate regarding becoming a reseller, Ameritech Mobile primarily attributes these difficulties on miscommunication and Cellnet's failure to effectively pursue its requests (*Id.* at 42, 47, 48).

Ameritech Mobile states that it is in compliance with the FCC rule[83] that requires that capacity be made available for resale. Moreover, Ameritech Mobile does not believe, pursuant to Section 4905.22, Revised Code, that it must provide such service to a customer who is unwilling to pay for it at appropriate rates (*Id.* at 45).

Further, Ameritech Mobile insists that its reseller pricing has always been fair and reasonable. Along these lines, Ameritech Mobile delineates that its AMBC pricing matrix, effective July 27, 1992, as contained in its former tariff provided significant volume discounts based on usage. Its successor reseller specific matrices provided resellers with reasonable discounts as well. Ameritech Mobile believes that these rates provide Cellnet with a reasonable margin for its operations, and in actuality are lower than Cellnet's own advertised retail rates (*Id.* at 50-52).

Ameritech Mobile insists that there is no regulatory directive that prescribes one particular wholesale rate for cellular providers. Therefore, Ameritech Mobile opines that the practice of pricing retail service on some cellular accounts pursuant to the same pricing matrix as wholesale service is not unlawful and does not signify that Cellnet was constructively denied service for the corporate market (*Id.* at 53).

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[83] *Cellular Order*, 86 FCC 2d 469, 511 (1981).

Even with respect to those situations in which a retail rate may be lower than the wholesale rate for Cellnet, Ameritech Mobile believes that this may be acceptable due to the fact that an end user has a contractual term for his/her line while a reseller doesn't have a contractual term on an individual line basis. In addition, Ameritech Mobile affirms that there is no rule that requires that all retail rates must be available for resale (*Id.* at 54).

With respect to any allegation regarding the absence of transactional record keeping, Ameritech Mobile claims that there are no such arguments made in Cellnet's third amended complaint. Ameritech Mobile views the record-keeping requirement as an issue between the Commission staff and Ameritech Mobile. The respondent fails to see how Cellnet can demonstrate any harm incurred due to any alleged failure of Ameritech Mobile to maintain the appropriate records (*Id.* at 54, 55).

(a) Ruling: Count IX — Relative to Ameritech Mobile

As already stated above, Ameritech Mobile has engaged in discriminatory conduct as summarized in our discussion of the various counts above. The Commission has the exclusive jurisdiction to hear and determine whether actions of a public utility constitute a breach of duty to furnish necessary and adequate service. *Westside Cellular, Inc. v. Northern Ohio Cellular Telephone Company (Cuyahoga 1995)*, 100 Ohio App.3d 768, 654 N.E.2d 1298.

With respect to Cellnet's allegations that Ameritech Mobile denied service from 1993-1995, as discussed above, the Commission finds that both Cellnet and Ameritech Mobile appear to agree that the first substantive discussions regarding specific terms and conditions of service did not occur until sometime in 1995. Although Cellnet considers Ameritech

Mobile's failure to tender a resale offer during 1993-1995 to signify statutory violations pursuant to Count IX, the Commission concludes, and the record reflects, that from 1993-1995, Cellnet did not formally pursue the opportunity to serve in a reseller capacity but rather, at best, its efforts equated to the level of an informal inquiry regarding the possibility of becoming a reseller (Tr. I, 60, 83).

Specific to this point, the Commission notes that Cellnet fails to produce any written documentation substantiating its concerted efforts to meet with Ameritech Mobile prior to the filing of this complaint. Rather, Cellnet focuses on some general telephone calls and discussions requesting a meeting regarding the potential of becoming a reseller, as well as the fact that Ameritech Mobile canceled a meeting that had been scheduled to discuss this opportunity (Tr. I, 87, 89-91). Nowhere in the record did Cellnet produce evidence of written communication formally expressing its desire to serve in the capacity of an Ameritech Mobile reseller or stating its frustration relative to Ameritech Mobile's refusal to meet with Cellnet to discuss the opportunity to become an Ameritech Mobile reseller. Therefore, with respect to Cellnet's allegations pertaining to Count IX for the 1993 — September 1995 time frame, the Commission finds that Cellnet's allegations relative to this count of the complaint should be denied.

Following the filing of the initial complaint in this proceeding, the record reflects that Cellnet received an offer of service in September 1995, as reflected in Cellnet Exhibits 3 and 4, as well as another offer for service in 1998, as reflected in Cellnet Exhibit 5. Cellnet asserts that, based on a comparison of the rates contained in Cellnet Exhibits 4 and 5 to the rates contained in Cellnet Exhibits 6, 10, 13, 14, 16, and 17, Ameritech Mobile has engaged in discriminatory conduct by offering rates in the retail market which were equal to or more desirable than the rates offered to Cellnet at wholesale.

Based on the findings of discrimination discussed in the counts above, the Commission concludes that for the time frame September 1995-1998 Ameritech Mobile has constructively refused capacity to Cellnet in violation of Section 4905.22, Revised Code. In particular, as a result of the discriminatory acts discussed in the counts above, for the time frame 1995-1998, Cellnet was not extended capacity pursuant to material terms and conditions or just and reasonable charges as required by law or order of this Commission.

As discussed above, pursuant to the Commission's orders in 84-944 and 89-563 Ameritech Mobile was obligated to ensure and maintain appropriate records to demonstrate that its affiliated retail operations were not treated in a preferential manner. Based on the record in this case and the conclusions discussed above, the Commission agrees with Cellnet that, for the time frame September 1995-1998, Ameritech Mobile wholesale has violated Section 4905.22, Revised Code, as a result of the offering of less attractive wholesale rates, terms, and conditions to Cellnet, as summarized in our discussion of the other counts of the complaint, as compared to those received by Ameritech Mobile retail. Therefore, Ameritech Mobile has constructively failed to offer wholesale capacity consistent with the Commission's prior orders.

To the extent that Cellnet's allegations are not specifically addressed by this discussion, or elsewhere in this Opinion and order, they are denied.

H. Count X — Cellnet has Experienced Real and Substantial Economic Harm Due to the Conduct of the Aforementioned Respondents

1. Cellnet Relative to AirTouch Cellular

Cellnet asserts that the alleged violations of the 84-944 and 89-563 orders, as well as the alleged violations of Sections

4905.33 and 4905.35, Revised Code, also constitute violations of Section 4905.22, Revised Code (Cellnet Initial Br. at 143). Cellnet contends that AirTouch Cellular wholesale is in noncompliance with Section 4905.22, Revised Code, because it charged Cellnet more than the amount that was just or reasonable. As a result, Cellnet alleges that AirTouch Cellular failed to provide adequate and necessary service to Cellnet at just and reasonable rates and, therefore, constructively denied access to Cellnet (*Id.* at 144; Cellnet Reply Br. at 52). As an example of this discrimination, Cellnet contends that, despite the Commission's desire to promote the resale of cellular service, Cellnet was effectively precluded from reselling to large corporate accounts due to the fact that AirTouch Cellular retail was offering a retail rate which is at or below the rate which Cellnet was paying (*Id.* at 144, 145).

Cellnet also asserts that AirTouch Cellular wholesale has failed to furnish necessary service and, thus, violated Section 4905.22, Revised Code, by failing to offer digital service as discussed above (*Id.* at 144).

(a) Ruling

Although Count X of Cellnet's Third Amended Complaint appears to be directly centered on the issue of the real and substantial economic injury incurred by Cellnet due to the alleged conduct of the respondents, Cellnet's briefs are restricted in focus to AirTouch Cellular's alleged violations of Section 4905.22, Revised Code, (Cellnet Initial Br. 143-145).[84] Such arguments are misplaced in the context of remedy sought through this count of the complaint. The Commission finds that its rulings with respect to the discrimination claims speak for themselves. As to the issue of any economic harm related to these determinations, the Commission finds that its jurisdiction

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[84] The Commission notes that Cellnet's briefs relative to Count X fail to address allegations against Ameritech Mobile.

relative to this case is limited to determining whether a public utility has violated any specific statute or order of the Commission. *State ex. Rel. Northern Ohio Tel. Co. v, Winter*, 23 Ohio St. 2d 6 (1970). Any determination relative to resulting economic harm or damages should be addressed by a court of competent jurisdiction.

The Commission is aware that, with respect to this count, as well as other counts of the complaint, Cellnet is requesting that the Commission apply the provisions of Section 4905.54, Revised Code, and seek forfeitures against AirTouch Cellular and Ameritech Mobile for violations of Commission orders. While, as elaborated above, the Commission finds in Cellnet's favor with respect to some of the allegations raised in its complaint, the Commission finds that this case has had a lengthy history before the Commission. This is in large part due to the unique jurisdictional and related discovery disputes that arose during the duration of this case. Since this is a case of first impression relative to the Commission's ability to hear complaint cases involving allegations of discrimination with respect to commercial mobile radio service providers, the Commission concludes that, in this particular case it will not assess any fines pursuant to Section 4905.54, Revised Code. By choosing not to impose a penalty, we are not creating a defense to potential future claims under Sections 4905.33 and 4905.35, Revised Code. We simply believe that, in this case, penalties which are statutorily permissible are not warranted.

Additionally, we point out that we are not speaking to the issue of Cellnet's ability to obtain treble damages pursuant to Section 4905.61, Revised Code. Cellnet will still have the burden of establishing, to a court of competent jurisdiction, the specific damages incurred as a result of the acts of discrimination.

To the extent that Cellnet's allegations are not specifically addressed by this discussion or elsewhere in this Opinion and Order, they are denied.

I. AirTouch Cellular's April 4, 2000 Motion to Compel Payment, or in the Alternative, Discontinue Service to Cellnet

By the Entry on Rehearing of August 5, 1999, in this case, the Commission determined that AirTouch Cellular should not discontinue service to Cellnet and should, instead, "continue to provide service consistent with the terms, conditions, and practices under which its has recently provided service to Cellnet" (Entry on Rehearing at 4). To this end, the Commission noted that this would include Cellnet's payment of approximately 90 percent of the assessed charges with approximately ten percent being withheld, representing charges which Cellnet alleged were illegal (*Id.*). By the Entry on Rehearing of September 30, 1999, the Commission reiterated that Cellnet is expected to make timely payments consistent with such prior existing payment practices.

On April 4, 2000, AirTouch Cellular filed a motion to compel Cellnet to comply with the August 5, 1999 and September 30, 1999 entries on rehearing or, in the alternative, for authority to discontinue service to complainant. Specifically, AirTouch Cellular requests that Cellnet be required to tender such amount as will result in Cellnet having paid at least 90 percent of the monthly wholesale charges assessed by AirTouch Cellular.

In support of its contentions regarding Cellnet's failure to make timely payments, AirTouch Cellular submitted copies of Cellnet's monthly bill summaries from October 1999 through March 2000. AirTouch Cellular alleges that this information substantiates that Cellnet has paid far less than the required 90 percent of the assessed monthly charges. Based on this

information, AirTouch Cellular represents that Cellnet has only paid 63 percent of the current charges due under the Commission's August 5 and September 30, 1999 entries on rehearing. In particular, AirTouch Cellular opines that as of March 10, 2000, the total outstanding and past due balance owed by Cellnet is $ 3,427,954.54. Inasmuch as this is unsecured debt, AirTouch Cellular represents that it has no assurance that this debt will be paid in the event that it prevails in this proceeding (April 4, 2000 Motion to Compel at 4).

On April 24, 2000, Cellnet filed its memorandum in opposition to AirTouch Cellular's motion to compel. Cellnet disputes the manner in which AirTouch Cellular has accounted for the payments made. In particular, Cellnet provides that AirTouch Cellular, itself, has acknowledged that Cellnet's past practice has been to pay current charges 60 days in arrears. Based on this premise, Cellnet purports that it has paid AirTouch Cellular 85 percent of all amounts billed during the relevant time frame (Cellnet Memoranda Contra at 5).

On May 3, 2000, AirTouch Cellular filed its reply memorandum in support of its motion to compel. AirTouch Cellular submits that up until June 1999, Cellnet would make one partial payment in the month following the invoice month and a second payment no later than the following month (within 60 days of the original invoice). These two payments combined would approximate 90 percent of the assessed charges. AirTouch Cellular contends that Cellnet no longer pursued this payment practice subsequent to June 1999 (May 3, 2000 Reply at 3).

CONCLUSION

The issue of the appropriateness of Cellnet's payment practices appears to be directly tied to the potential application of the terms and conditions of the payment arrangement previously entered into between Cellnet and AirTouch Cellular.

This is currently the subject of a pending case before the Franklin County Court of Common Pleas, *NewPar d/b/a AirTouch Cellular v. Westside Cellular d/b/a Citilink*, Case No. 97CVHJ-10-9196.

The court issued an Order of Stay on September 8, 1998, in which it determined that, while it retained jurisdiction over any alleged breach of the payment arrangement, the court was staying its consideration of the matter until a final adjudication of the instant case currently before the Commission.

Upon further review of the record, the Commission finds that, due to our inability to order damages, and in light of the direct interrelationship of the disputed payment plan and the eventual issuance of damages/credits, we leave it to the court to consider these issues in their totality based on the complex factual record and history of the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The third amended complaint filed by Cellnet in this matter generally alleges that Ameritech Mobile and AirTouch Cellular have both failed to separate their wholesale and retail operations consistent with past Commission orders, and have refused to make their services universally available on equal terms to unaffiliated resellers, thereby charging or proposing to charge Cellnet more than is charged to their own affiliated reseller in violation of past Commission orders and several statutes.

(2) AirTouch Cellular and Ameritech Mobile each filed its answer to the third amended complaint on July 27 and August 4, 1998, respectively, generally denying the material allegations of the complaint.

(3) After several procedural delays, the public hearings were held at the offices of the Commission on January 26 through 28 and February 10, 1999 relative to Ameritech Mobile

and January 26, February 1 through 11, and March 1, 1999, relative to AirTouch Cellular.

(4) Ameritech Mobile and AirTouch Cellular are telephone companies as defined by Section 4905.03(A)(2), Revised Code, and public utilities by reason of Section 4905.02, Revised Code, and are, therefore, subject to the jurisdiction of this Commission under authority of Sections 4905.04 and 4905.05, Revised Code.

(5) In a complaint such as this one, the burden of proof rests with the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189.

(6) Ameritech Mobile and AirTouch Cellular are both in violation of failing to maintain their cellular wholesale and retail operations in the manner proscribed by prior Commission orders.

(7) For the specified time frames, Ameritech Mobile and AirTouch Cellular failed to maintain its records in the manner proscribed by prior Commission orders.

(8) For the specified time frames, Ameritech Mobile and AirTouch Cellular are both in violation of past Commission orders and several statutes for refusing to make their services, as described in this Opinion and Order, universally available on equal terms to nonaffiliated resellers. Such conduct resulted in the charging or the proposing to charge Cellnet more than is charged to their affiliated retail arms, absent any justifiable explanation.

(9) Since this is a case of first impression, the Commission finds that the imposition of statutory penalties against Ameritech Mobile and AirTouch Cellular are not warranted in this case.

ORDER

It is, therefore,

ORDERED, That Cellnet's complaint is granted in part and denied in part. It is, further,

ORDERED, That the above findings be observed. It is, further,

ORDERED, That the docketing division should maintain for 18 months from the date of this Opinion and Order, all documents that have been granted protective status in this docket. It is, further,

ORDERED, That copies of this Opinion and Order be served upon Cellnet, Ameritech Mobile, AirTouch Cellular, respective counsel, and any other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/
Alan R. Schriber, Chairman

/s/
Ronda Hartman Fergus

/s/
Judith A. Jones

/s/
Donald L. Mason

APPENDIX C

SUPREME COURT OF OHIO

CINCINNATI SMSA LIMITED PARTNERSHIP,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

Case No. 01-1158

(P.U.C.O.)

Filed: February 19, 2003

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(P.U.C.O. No. 931758RCCSS)

/s/
THOMAS J. MOYER
CHIEF JUSTICE

APPENDIX D

SUPREME COURT OF OHIO

NEW PAR, F.K.A. AIRTOUCH CELLULAR, N.K.A. VERIZON, ET AL., *Appellants*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO ET AL., *Appellees*.

No. 2001-1132

November 13, 2002, Submitted

December 30, 2002, Decided

OPINION

FRANCIS E. SWEENEY, SR., J.

{¶1} This is an appeal as of right. The appellants are New Par, f.k.a. AirTouch Cellular, n.k.a. Verizon, and a number of other entities that have done business as cellular telephone service providers. The appellees are the Public Utilities Commission of Ohio ("commission") and intervenor Westside Cellular, Inc., which does business as Cellnet.

{¶2} Cellnet is a cellular telephone service reseller. As such, it purchases cellular service on a wholesale basis, rebrands the service, and markets it to the general public on a retail basis. On October 18, 1993, Cellnet filed a complaint in commission case No. 93-1758-RC-CSS against wholesale cellular service providers, including New Par. The complaint asserted that the appellants discriminated against Cellnet by unlawfully providing cellular service, equipment, and features to its own affiliated resellers at rates, terms and conditions more favorable than those they made available to Cellnet. In its January 18, 2001 opinion and order ("the order"), the

commission generally agreed with Cellnet's assertions and held that the appellants, in violation of commission rules and regulations and Ohio statutes, had unlawfully discriminated against Cellnet by providing cellular service to appellants' affiliated resellers at rates and upon terms and conditions more favorable than those made available to unaffiliated resellers, such as Cellnet.

{¶3} Appellants argue that the order is unlawful because (1) the commission's jurisdiction was preempted by federal law; (2) the commission based part of its decision on regulations that appellants' claim are invalid because they were not properly promulgated or are so vague as to be unenforceable; and (3) the evidence does not establish that appellants' conduct was unlawfully discriminatory.

Appellants' Preemption Argument

{¶4} The order depends in part on regulatory determinations by the commission in two earlier proceedings before it: *In the Matter of the Commission Investigation Into the Regulatory Framework for Telecommunication Services in Ohio*, case No. 84-944-TP-COI, April 9, 1985 Opinion and Order (the "944 order") and *In the Matter of the Commission Investigation Into Implementation of Sections 4927.01 through 4927.05, Revised Code, as They Relate to Competitive Telecommunication Services*, case No. 89-563-TP-COI, October 22, 1993 Finding and Order (the "563 order"). The order is also based upon the commission's findings under R.C. 4905.33 and 4905.35, which pertain to unjust corporate practices, and its authority to address these complaints pursuant to R.C. 4905.26.

{¶5} Appellants argue that the commission's authority to regulate appellants' operations regarding rates was preempted by the 1993 Congressional enactment of Section 332 of the Communications Act, which reads as follows:

{¶6} "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service *except that this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services.*" (Emphasis added.) Section 332(c)(3)(A), Title 47, U.S. Code. Section 332 includes a grandfathering clause that permitted states to regulate "rates charged" if the state showed by August 9, 1994, in an appropriate petition to the Federal Communications Commission, that it had "any regulation concerning the rates for any commercial mobile radio service" ("CMRS") in effect on June 1, 1993. Section 332(c)(3)(B). States retained their authority to regulate "rates charged" until the FCC decided the states' petitions, "including any reconsideration." *Id.*

{¶7} Even though it did not believe that it was regulating rates, the commission submitted such a petition, informing the FCC that, it was "using its complaint authority to ensure that the rates of a cellular wholesaler are not unduly discriminatory, preferential to affiliates, or anticompetitively set below cost." *In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services (1995)*, 10 F.C.C.R. 7842, 1995 WL 312498. The FCC denied Ohio's petition to continue regulation, in part because the commission did not demonstrate that it was regulating the "rates charged" by any CMRS provider in Ohio as of June 1, 1993.

{¶8} Indeed, prior to this appeal appellants' preemption argument has been adjudicated 12 times by various tribunals and regulatory agencies, including the commission and the FCC. Heretofore, New Par has enjoyed not a single unreversed determination of federal preemption under Section 332(c)(3)(A), Title 47, U.S. Code. Appellants make their preemption argument a 13th time in this appeal.

{¶9} We will not here reprise an analysis of the legal requirements for federal statutory preemption of state law. We conclude that the commission's determinations in its 944 and 563 orders and its enforcement of R.C. 4905.33 and 4905.35 under R.C. 4905.26 in this complaint was not regulation of appellants' rates under Section 332, Title 47, U.S. Code, because it was "regulating the other terms and conditions of [appellants'] commercial mobile services." Section 332(c)(3)(A), Title 47, U.S. Code. As a result, the commission's regulation of appellants was not preempted under the federal statute.

Regulations Improperly Adopted or Vague

{¶10} Appellants argue that the regulatory requirements established in the 944 and 583 orders, by which the commission judged appellants' business conduct amounted to administrative rules having general and uniform operation applicable to all cellular service providers. Consequently, appellants claim, the requirements were not properly promulgated pursuant to R.C. 111.15, and thus, they were invalid and unenforceable. Appellants might well have included in their argument agency promulgation of rules pursuant to R.C. 119.03 by virtue of the commission's inclusion as a rule-making agency under R.C. 119.01(I).

{¶11} What appellants' argument ignores is that prior to 1997, the commission's rule-making activities were not subject to the mandatory requirements of either R.C. 111.15 or 119.03. And the commission argues that it acted in accordance with the law: believing that the procedures under these statutes did not apply to the commission, it would sometimes file rules or determinations with the Joint Committee on Agency Rule Review (JCARR), the Secretary of State, the Legislative Service Commission (LSC), or none of them, in its discretion.

{¶12} In 1997, the General Assembly changed this situation. By adopting Am.Sub.H.B. No. 215, the General Assembly amended portions of both R.C. 111.15 and 119.01 to include the commission within the R.C. 111.15 and 119.03 processes. R.C. 111.15 was amended to require the Public Utilities Commission to follow rule-making protocols. 147 Ohio Laws 909, 941. The definition of "rule making agency" in R.C. 119.01 was amended to include the commission. Id. at 948. Since statutes must be presumed to be prospective in their effects, these amendments mean that prior to their effective date, the commission was not subject to the rule-making procedures under either R.C. 111.15 or 119.03. R.C. 1.48. Not only is there the statutory presumption of prospective application of R.C. 111.15 and 119.03 as regards rule-making by the commission, but the General Assembly intended the changes bringing the commission into the rule-making process to be prospective. It said so:

{¶13} "Sections 111.15 and 119.01 of the Revised Code, insofar as those sections are amended by this act to clarify that rules of the Public Utilities Commission are subject to legislative review, apply prospectively only. A rule of the Public Utilities Commission adopted prior to the effective date of the amendment of § 111.15 and 119.01 of the Revised Code, which rule was not submitted to legislative review, is ratified, insofar as that omission otherwise may raise a questions with respect to the validity of the rule." 1997 Am.Sub.H.B. No. 215, Section 155, 147 Ohio Laws 909, 2194. Thus, the General Assembly recognized the commission's exemption from statutory rule-making procedures and indicated that the statutory changes needed to bring the commission into the rule-making requirements would "apply prospectively only." *Id.* The effect of the 1997 amendments was to make future rule-making activity by the commission subject to R.C. 111.15 and 119.03, while leaving earlier determinations in force. Since the 944 and

the 563 orders both predate this legislation, they are effective without regard to R.C. 111.15, 119.01, and 119.03.

{¶14} Appellants not only argue unconvincingly that the regulatory requirements established in the 944 and 563 orders were improperly adopted administrative rules, but that the orders were so vague as to be unenforceable.

{¶15} Some of appellants actively participated in the commission proceedings that resulted in the 563 orders and submitted comments to the commission that urged the commission to adopt the streamlined regulations contained in the order. Additionally, shortly after the 944 order was adopted, appellants' predecessors-in-interest applied for and received from the commission certificates of convenience and necessity to operate as deregulated cellular telecommunication service providers. In connection with each of their applications, the applicant provided to the commission an affidavit agreeing to comply with the very requirements of the 944 order that appellants now challenge as being overly vague. Moreover, it is undisputed that appellants have accepted and enjoyed a number of benefits that flowed from the deregulation of retail cellular service providers pursuant to the 944 and 563 orders.

{¶16} Based on the foregoing, we will not now accept appellants' argument that those orders are so vague as to be unenforceable. Indeed, we emphatically reject appellants' argument.

Evidence of Unlawfully Discriminatory Conduct

{¶17} Appellants have told this court that the evidence considered by the commission does not support its findings of their unlawful discriminatory conduct. In asking the court to agree with them and reverse the commission, appellants are requesting that the court examine and weigh the evidence contained in a record of over 1100 pages of testimony and

thousands of pages of exhibits. It is clear from the order that the commission carefully and thoroughly considered the evidence before it. We hereby decline to review and weigh that evidence anew on authority of *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (2001), 92 Ohio St. 3d 177, 179-180, 749 N.E.2d 262, (and cases cited therein), as cited with approval in *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 84, 765 N.E.2d 862, and *Westside Cellular, Inc. v. Pub. Util. Comm.*, 98 Ohio St.3d 165, 2002 Ohio 7119, 761 N.E.2d 199.

{¶18} Therefore, we affirm the decision of the commission as to all issues.

Order affirmed.

MOYER, C.J., DOUGLAS, FARMER, PFEIFER and LUNDBERG STRATTON, JJ., concur.

COOK, J., concurs in judgment only.

SHEILA G. FARMER, J., of the Fifth Appellate District, sitting for RESNICK, J.

APPENDIX E

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WESTSIDE CELLULAR INC., d/b/a
CELLNET, *Plaintiff*,

vs.

NEW PAR, *et al., Defendants*.

Case No. 428050

OPINION

Timothy J. McGinty, J.:

This matter comes before the Court on the Motions for Judgment on the Pleadings of Defendants AirTouch, Cincinnati and Cellco, as well as Defendants' Joint Motion to Limit the Scope of Damages Issues at Trial.

Defendants New Par, f/k/a AirTouch Cellular, Verizon Wireless VAW (LLC), AirTouch Cellular Eastern Region LLC and Vodafone Americas Asia, Inc. ("AirTouch") have moved this Court pursuant to Civ. R. 12(C) for judgment on the pleadings on Count Two of Plaintiff Westside Cellular, Inc. d/b/a Cellnet of Ohio's ("Cellnet") Complaint.

Defendant Cincinnati SMSA Limited Partnership ("Cincinnati") and Defendant Ameritech Mobile Services, Inc. ("Ameritech") have moved this Court pursuant to Civ. R. 12(C) for judgment on the pleadings on Count Two of the Complaint as to Cincinnati and on both Counts One and Two of the Complaint as to Ameritech. Ameritech having been voluntarily dismissed without prejudice by Plaintiff Cellnet, this Court will address that motion solely as it relates to Defendant Cincinnati.

Defendant Cellco Partnership ("Cellco") has moved this Court pursuant to Civ. R. 12(C) for judgment on the pleadings on Cellnet's; Complaint.

Having considered AirTouch's Motion for Judgment an the Pleadings and responsive briefs[1]; Cincinnati's Motion for Judgment on the Pleadings and responsive briefs[2]; Cellco's Motion for Judgment on the Pleadings and responsive briefs[3]; and having further considered Defendant's Joint Motion to Limit the Scope of Damages Issues and responsive briefs as they relate to the matter of unjust enrichment, as well as the oral arguments of the parties on all of the above, this Court finds as follows:

Opinion

Ohio R. Civ. P. 12(C) provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

The Ohio Supreme Court has instructed that dismissal under Civ. R. 12(C) "is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v.*

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[1] This Court hereby grants leave to Defendant AirTouch to file a Reply in Support of Motion for Judgment of Dismissal of Count Two of the Complaint.

[2] This Court hereby grants leave to Defendant Cincinnati to file a Reply In Support of Motion for Judgment on the Pleadings.

[3] This Court hereby grants leave to Defendant Cellco to file a Reply in Support of Motion for judgment on the Pleadings.

Pontius (1996), 75 Ohio St.3d 565, 569-570. Accordingly, in order to be entitled to judgment on the pleadings on Count One of Plaintiff's Complaint pursuant to Civ. R. 12(C), Defendants must demonstrate beyond reasonable doubt that Cellnet can prove no set of facts warranting the requested relief, after construing all material factual allegations in the Complaint and all reasonable Inferences therefrom in Cellnet's favor.

AirTouch argues that other than the damage claim authorized by R.C. 4905.61, a Court of Common Pleas has no jurisdiction to hear a claim against a public utility relating to rates or services. AirTouch characterizes R.C. 4905.61, with its remedy of actual damages trebled, as the sole or *exclusive* avenue of recovery for any plaintiff who claims injury resulting from a public utility's violation of laws or regulations governing public utilities.

Cincinnati argues that Cellnet's unjust enrichment claim must be dismissed as a matter of law for two reasons: (1) Equitable remedies such as unjust enrichment are not available to a party that has an adequate remedy at law; and (2) Cellnet has failed to allege, as it must, the required elements of a cause of action for unjust enrichment. Cincinnati likewise characterizes R.C. 4905.61 as Cellnet's *exclusive* remedy.

Cellco argues that this Court looks subject matter jurisdiction over Cellnet's unjust enrichment claim because the jurisdictional limitations in R.C. 4905.61 apply to common law claims that are, in essence, common law versions of R.C. 4905.61 claims.

Cellnet argues that the General Assembly intended R.C. 4905.61 to provide a specific, but not exclusive remedy for persons injured by a utility's violations of statutory and Commission orders. Cellnet submits that Count Two of its Complaint is based on common law principles of "unjust

enrichment" and not R.C. 4905.61, and utilities are not immune to common low causes of action.

It should be noted that despite extensive briefing an the issue, this Court is aware of no controlling case law, statute or authority which either directly permits or forecloses the type of equitable relief sought by Plaintiff in addition to the statutory relief requested.[4]

It is well settled that Ohio's public utilities are not immune from common law tort and contract claims and that such claims may properly be heard in a Court of Common Pleas. The Ohio Supreme Court has hold that claims sounding in contract or tort are reviewable in the Courts of Common Pleas, although they are brought against corporations subject to the authority of the Commission. *Milligan v. Ohio Bell Telephone Co.* (1978), 56 Ohio St.2d 191; *See also: New Brennan v. Pub. Util. Comm.* (1921), 103 Ohio St. 23.

In *Milligan*, the Ohio Supreme Court recognized the Common Pleas Court's jurisdiction pursuant to R.C. 2305.01 to hear a complaint alleging the violation of the right of privacy by a utility, regardless of the fact that Plaintiff additionally sought treble damages pursuant to R.C. 4905.61 for rate and service violations. *Milligan v. Ohio Bell Telephone Co.* (1978), 56 Ohio St.2d 191, 195. More recently, in *Kohli v. Pub. Util. Comm.* (1985), 18 Ohio St.3d 12, the Ohio Supreme Court

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[4] Defendants AirTouch and Cincinnati argue that the Ohio Supreme Court "completely abrogated" or "specifically foreclosed" the bringing of an equitable unjust enrichment claim based on rates and services in a common pleas court in *Keco Industries, Inc. v. Cincinnati Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254. AirTouch states: "[T]he Ohio Supreme Court squarely ruled that a state court claim of unjust enrichment, like Cellnet's Count II, based on unreasonable rates is not available against a utility." The Ohio Supreme Court actually held that "restitution was not available to the plaintiffs under the circumstances" of that case, which are clearly and easily distinguishable from the circumstances in the case at bar.

again recognized that a court of competent jurisdiction, rather than the PUCO, is the appropriate forum for common law tort actions.

However, from the face of the Complaint, it is clear that Cellnet's claim for unjust enrichment is not a claim sounding purely in tort or contract.

Count Two consists of the incorporation of paragraphs 1 through 24 of the Complai nt, and the following two additional paragraphs:

> 26. As a result of Defendants' violations of Commission rules and regulations and the Ohio Rev. Code described in the Commission's Opinion and Order in the 1758 Case[5], Defendants acquired customers and business and achieved profits that, but for such violations, would have belonged to Cellnet.
>
> 27. Defendants have been unjustly enriched at Cellnet's expense by profiting from the unlawful conduct detailed in the Commission's Opinion and Order in the 1758 Case.

Cellnet's unjust enrichment claim is a theory of liability based on the same violations by the Defendants of Commission orders and state statutes regarding rates and services that underlie Count One of the Complaint.

Ohio Courts have consistently held that a claim which is "in essence" a complaint regarding rates and services is within the exclusive jurisdiction of the Public Utilities Commission. Purportedly common law claims, which are essentially derived from the statutes regulating the public utilities, can only be brought before the Commission, and a court of common pleas

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[5] In the Matter of the Complaint of Westside Cellular, Inc. d.b.a. Cellnet, PUCO Case No. 93-1758-RL-CSS (Opinion Issued January 18, 2001).

has no jurisdiction to hear them. *Westside Cellular, Inc. v. Northern Ohio Cellular Tel. Co.* (1995), 100 Ohio App.3d 768, 771.

As described by the Ohio Supreme Court, the General Assembly has adopted a comprehensive scheme for regulating the business activities of public utilities. "The Commission has been granted exclusive jurisdiction to hear and determine matters which are in essence rate and service oriented." *Kazmaier Supermarket v. Toledo Edison Co.* (1991), 61 Ohio St. 3d 147. "The General Assembly has provided a rather specific procedure by which customers may challenge rates or charges of a public utility that are 'in any respect' unjust, unreasonable or unlawful, and has designated the commission as the appropriate forum before which such claims are to be heard." *Id.*

In *State, ex rel. Northern Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, it was stated in pertinent part:

> The General Assembly has enacted an entire chapter of the Revised Code dealing with public utilities, requiring, *inter alia,* adequate service, and providing for permissible rates and review procedure. * * * This comprehensive scheme expresses the Intention of the General Assembly that such powers were to be vested solely in the Commission. As this court stated in *State, ex rel. Ohio Bell Telephone Co. v. Court of Common Pleas* (1934), 128 Ohio St. 553 at 557:
>
> "The jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state, including the regulation of rates and the enforcement of repayment of money collected * * * during the pendency of the proceeding * * * is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive."

This Court finds that the allegations of Count Two of the Complaint are in essence "rate and service" oriented. Therefore, the substance of the violations on which Cellnet bases Count Two of its Complaint for unjust enrichment are matters within the exclusive jurisdiction of the PUCO.

As such, this Court would not have jurisdiction over the claims asserted in Count Two absent a finding by the PUCO of a violation of a statute or order of the Commission, even though such claims are purportedly common law. Due to the jurisdictional limitations on this Court to hear "rate or service" oriented cases by Title 49 of the Ohio Revised Code, this Court's limited jurisdiction to hear a damages claim arising from conduct which is "rate or service" oriented against Defendants necessarily seems from the comprehensive statutory scheme as described above and below.

The General Assembly has provided a specific remedy for persons, firms or corporations who have sustained damages due to an unlawful act of a public utility, or where such damages arise from the utility's omission to do any act or thing required by law or by the order of the Commission. R.C. 4905.61 provides that in such instances, the utility is liable for treble damages. *Kazmaier Supermarket Inc. v. Toledo Edison Company* (1991), 61 Ohio St.3d 147.

R.C. 4905.61 provides in pertinent part:

> [i]f any public utility * * * does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925 of the Revised Code, or declared to unlawful, or omits to do any act or thing required by such chapters or by order of the public utilities commission, such public utility * * * is liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, failure or omission.

In *Meek, et al. v. Gem Boat Service, Inc.* (1990), 69 Ohio App.3d 404, the Sixth District Court of Appeals held that damages recoverable under that "specific remedy" are only the plaintiff's actual damages.

> We also find that two methods already exist for deterring entities, which act as public utilities, from ignoring the P.U.C.O's authority. The first method is R.C. 4905.99(C), which permits the P.U.C.O. to impose criminal penalties for such a violation. The second method is R.C. 4905.61, which provides that the entity is liable for treble the damages suffered as a result of the violation. See *French v. Dwiggins* (1984), 9 Ohio St.3d 32, 36.
>
> Finally, we look to the purpose of the statute and the general meaning of the word "damages." "Damages" has been defined as the pecuniary compensation paid by a wrongdoer for the losses suffered by an injured person. *Cincinnati v. Hafer* (1892), 49 Ohio St. 60, 67; *Greer v. Bd. of Commrs. of Knox Cty.* (1927), 33 Ohio App. 539; *Drayton v. Jiffee Chemical Corp.* (D.C. Ohio 1978), 395 F.Supp. 1081, motion denied (1976), 413 F.Supp. 834, modified (C.A.6 1978), 591 F.2d 352. We find nothing in the statute, or its counterparts, which would indicate that the legislature intended "damages" to incorporate more than actual loss.
>
> We conclude that appellees may recover only the actual damages they sustained as a result of appellant's failure to submit to the PUCO's regulation, which pursuant to the statute must be trebled. *Id.* at 409.

Similarly, in *Reber d/b/a Carpet Color Systems v. The Ohio Bell Tel. Co.* (Apr. 6, 1993) Franklin App. No. 92AP-1066, unreported Ohio App. Lexis 2033, the court stated:

> Pursuant to R.C. 4905.61, appellant could recover only the actual damages sustained as a result of Ohio Bell's, failure

to provide adequate service, which pursuant to the statute, must be trebled.

As a matter of law, this Court finds that the remedy of unjust enrichment is not available to Cellnet for "rate and services" oriented violations found by the PUCO. The statutory scheme which has evolved requires that liability for any claim against a public utility based on rates or services must first be determined by the Commission, and any claim for damages caused by conduct found to be unlawful by the Commission may then be heard in a court of competent jurisdiction. The jurisdiction to hear such a claim for damages is conferred by R.C. 4905.61. Pursuant to R.C. 4905.61, the only damages recoverable are Cellnet's actual damages trebled.

The Plaintiff is entitled to recover damages for the effects of the discriminatory conduct of the Defendants which include damages for overcharges, lost profits, including lost customers, for the violations period, all of which will be trebled. The Plaintiff is not entitled to any so called "lost enterprise value" for a business that has been limited, but not terminated.

An award of interest as a portion of compensatory damages may well be proper in this case for any award of damages that a jury may find. Whether the yes or no question as to interest will be provided within the jury interrogatories or whether the whole issue will be handled instead by the trial court after any award is given will be decided at the time of trial.

Any error regarding interest is the least problematic for appellate review. If interest shouldn't have been added, the appellate court can deduct it. If for example the statutory interest rate is used and the higher court declares it to [sic] low or excessive, the correction will be a simple matter of mathematical adjustment.

Conclusion

The legislature has created a process and a Commission to regulate public utilities, including the cellphone business and its marketplace. The legislature and the Public Utilities Commission have wisely created policies and procedures that promote competition so that the businesses and people of Ohio are the beneficiaries.

Within this statutory structure, wrongdoing within a utility market is tried and decided at the Public Utilities Commission and damages ultimately decided in a court of competent jurisdiction by ordinary people at the jury level. Unfortunately, this statutorily created process is not always going to be able to achieve perfect justice.[6]

The damages claims to be decided by a jury must be limited to actual damages and the punishment/penalty for the offenders' misconduct in the marketplace is the statute that permits those actual damages to be trebled by this Court.

If a plaintiff's case is delayed many years at the Commission and the courts by inaction or delay tactics, such offenders may have gained an unfair market share, and quite possibly a very significant marketshare, in the meantime. A Court cannot

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[6] As noted above, although *Keco Industries Inc. v. Cincinnati Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254 involved distinguishable circumstances, the Ohio Supreme Court likewise struggled with principles of equity in considering a claim of unjust enrichment as a remedy for a utility's rates found to be unreasonable. In adopting the conclusion of the trial court, the Court stated: "It may seem inequitable to permit the defendant to retain the difference in the rates . . ., but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances . . . Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation."

however expand the type of damages that a jury can award to compensate for the failure of the statutory process to decide cases efficiently.

A plaintiff's economist's projections and arguments of unjust enrichment may well meet the acceptable standards of theory within the field, but the law must operate within a degree of certainty regarding damages. A court cannot permit an unjust enrichment claim that is soundly based on the uncertainties of life and the market.

Judgment on the pleadings is granted in favor of Defendants AirTouch, Cincinnati and Cellco on Count Two of the Complaint for unjust enrichment.

The scope of damages at trial shall be in accordance with this Opinion.

IT IS SO ORDERED,

/s/
JUDGE TIMOTHY J. MCGINTY

Date: March 21, 2003

No. 02-1711

Supreme Court, U.S.
FILED
JUL 18 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

CINCINNATI SMSA LIMITED PARTNERSHIP,

PETITIONER,

V.

PUBLIC UTILITIES COMMISSION OF OHIO,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

In 1993, Westside Cellular, Inc. d/b/a Cellnet ("Cellnet') instituted an action under then-existing Ohio law alleging that Petitioner (a cellular telephone service provider) had discriminated against Cellnet in the sale or proposed sale of cellular service to Cellnet. In December 2002, the Ohio Supreme Court ruled that 47 U.S.C. § 332(c)(3)(A) ("§ 332"), which prohibits states from regulating the "rates charged" by cellular companies, did not preempt Cellnet's action. The Ohio Supreme Court determined that the express language of § 332 which permits states to regulate "other terms and conditions of service" supported its ruling.

Following that decision, in April 2003, Cellnet and Petitioner settled their dispute. Despite that full and final settlement, Petitioner now seeks a writ of *certiorari* for this Court to review the Ohio Supreme Court's decision.

Petitioner's application for a writ of *certiorari* should be denied for the simple reason that the underlying case has been settled and dismissed, and thus, no case or controversy exists. In essence, Petitioners are asking this Court to review an opinion of the Ohio Supreme Court in a case which no longer exists. Moreover, the law which the Ohio Supreme Court has applied and construed was repealed in 1999. There is nothing left for this Court to review.

In addition to the complete absence of any existing claim or controversy, this case does not present the Court with any conflict between state and federal law. Petitioners argue that § 332 preempted Ohio from considering the underlying dispute. That case, however, was brought by Cellnet alleging that Petitioner had engaged in unlawful discrimination in violation of then-existing Ohio law. Cellnet never claimed that a rate was reasonable or unreasonable, only that Petitioner's conduct was unlawfully discriminatory. The Ohio Supreme Court recognized that, while rate regulation is preempted, § 332 expressly permits states to regulate "other terms and conditions" of service. There is no conflict with any federal forum. The FCC, looking at Ohio's

regulation in the context of the Cellnet case, has held that the Ohio law underlying Cellnet's case did not amount to rate regulation. Likewise, no federal appeals court other than the Sixth Circuit has ever addressed whether Ohio's regulations and statues or similar regulations or statutes from other states are preempted by § 332.

The Sixth Circuit reviewed the Cellnet case in 1997 and held that Cellnet's claim was not facially preempted and that federal courts should abstain from deciding the preemption issue and that Ohio should decide this issue for itself. *GTE Mobilnet v. Johnson*, 111 F.3d 469 (6th Cir. 1997). Ohio's conduct is entirely consistent with that edict, not conflict.

This case is simply an attempt by Petitioner to obtain an advisory opinion to prevent future litigation without affording those "ghost" plaintiffs an opportunity to be heard.

Accordingly, Petitioner's application for a writ of *certiorari* should be denied.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Cincinnati SMSA Limited Partnership ("CLP") has one general partner, Ameritech Mobile Communications LLC, which is not publicly traded and which is an affiliate of Cingular Wireless LLC, which also is not publicly traded. The limited partners of CLP are (i) Convergys Information Management Group, which is owned by Convergys Corporation, a publicly traded company; (ii) ALLTELL Communications Investment Company, which is owned by ALLTELL, a publicly traded company; and (iii) GIT-Cell, Inc., which is not publicly traded.

Respondent is the Public Utilities Commission of Ohio.

Westside Cellular, Inc. d/b/a Cellnet, a party to the proceedings below is not a publicly traded company.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On May 2, 2003, Petitioner and Intervenor-Respondent Cellnet fully settled all claims between them. The Ohio regulations in question were repealed effective December 31, 1999. This Court should not issue an advisory opinion on a moot case arising from a law that has been repealed. In any event, the opinion below was correct on the merits and does not conflict with any state or federal precedent. Certiorari should be denied.

I. PARTIES.

Westside Cellular, Inc. ("Cellnet") was a reseller of cellular telephone minutes and service. Between July 1991 and June 10, 2003, Cellnet purchased bulk cellular service from cellular licensees such as Petitioner on a wholesale basis, and resold that service to consumers. Cellnet is unaffiliated with Petitioner and is, thus, commonly referred to as an "unaffiliated reseller." Petitioner's own retail operations are referred to as "affiliated resellers." Petitioner is a limited partnership owned indirectly by SBC Communications, Bell South and Convergys.

II. PETITIONER CONFOUNDS "UNREASONABLE RATES" AND "UNREASONABLE DISCRIMINATION."

A. Petitioner Ignores Well-Settled Distinction Between "Unreasonable Rates" and "Unreasonable Discrimination."

The Telecommunications Act was modeled on the Interstate Commerce Act of 1887 and is interpreted in accordance with it.[1] *MCI Tel. Corp. v. FCC*, 59 F.3d 1407, 1418 (D.C. Cir. 1995). The

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[1] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. §§ 10101-11917 (1988 & Supp. 1993)).

Interstate Commerce Act was itself based upon "the 'ancient law' of common carriers. . . . Central to the body of common law was the principle that no common carrier has the right to discriminate between persons or places, or to give preferences in any manner." Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions — A Product of Evolutionary Development, in A Legislative History of Communications Act of 1934*, at 25, 29 (Max D. Paglin ed., 1989).[2]

The legislative history of the Interstate Commerce Act shows that Congress has long understood the difference between "unreasonable rates" and "unreasonable discrimination." In 1886, in preparation for passage of the Interstate Commerce Act, Congress authored the Cullom Report. The "Cullom Report noted that discrimination 'is most conspicuous when and where competition is most active.' The committee accordingly concluded that 'whereas competition is a safeguard against extortion' (i.e. the excessive rates that a monopoly can exact), 'experience has shown it is no safeguard against discrimination.' Thus, it was vigorous competition, as much as anything else that gave rise to the wide variety of kickbacks, gratuities, and other devices that agitated much of the public. By 1887, the populist movement that had arisen in opposition to these 'preferences', which were associated with large, monied, better-situated, and particularly corporate interests could no longer be resisted, and the first major federal regulatory statute [the Interstate Commerce Act] was enacted. This history is central to understanding the original paradigm of regulated industries law." Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Columbia L. Rev., 1323, 1333 (October 1998).

The Cullom Report recognized the difference between unreasonable prices (*i.e.*, extortionate rates) and unreasonable discrimination (*i.e.*, even though the prices may be low, the carrier prefers some customers over others). Through the Interstate Commerce Act, and later, the Telecommunications Act, Congress

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[2] *See also Munn v. Illinois*, 94 U.S. 113, 129 (1877) (reviewing common law roots of regulation of common carriers).

separately prohibited unreasonable rates and unreasonable discrimination.[3]

B. Petitioner's Sleight of Hand: Switching "Unreasonable Discrimination" and "Unreasonable Rates."

The regulation of unreasonable rates and the regulation of unreasonable discrimination are different in substance and in structure. Unreasonable rates are determined by looking at the costs and profits of a service provider. *MCI Tel. Corp.*, 59 F.3d at 1410. In contrast, unreasonable discrimination is determined by looking at whether two buyers are treated similarly – without regard to the costs and profits of the service provider. *MCI Tel. Corp. v. FCC*, 842 F.2d 1296, 1303 (D.C. Cir. 1988).

Both federal and state law regulate unreasonable rates and unreasonable discrimination in separately codified sections. For example, 47 U.S.C. § 201 prohibits unreasonable rates, while 47 U.S.C. § 202 prohibits unreasonable discrimination. Similarly, Ohio Revised Code § 4909 *et seq.* requires reasonable rates while Ohio Revised Code § 4905.35 prohibits discrimination. The inquiry into reasonableness of rates depends on the costs associated with producing a service. *MCI Tel. Corp.*, 59 F.3d at 1407 (exceeding F.C.C. rate of return prescription is *per se* violation of § 201's prohibiting against unreasonable rates). Similarly, *inter alia*, because of concern that utilities might set excessively high rates, Ohio utilities are not generally permitted

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[3] The Supreme Court has similarly recognized that assuring equal rates - as distinguished from low rates - was the primary purpose for barring discrimination. "It cannot be challenged that the great purpose of the act to regulate commerce, whilst [also] seeking to prevent unjust and unreasonable rates, was ***to secure equality of rates as to all and to destroy favoritism***, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination." *New York, N.H. & H.R. Co. v. ICC*, 200 U.S. 361, 391 (1906) (emphasis added); *see also 1* A.G.J. Priest, *Principles of Public Utility Regulation*, 285 (1969) ***("Even exorbitant rates probably have generated less irritation and exasperation than discriminatory practices.")*** (Emphasis added.)

unilaterally to set, prescribe or fix their own rates. Instead, Ohio has an elaborate process under Ohio Revised Code § 4909 for determining, based upon the relevant costs, the "fair" or "reasonable" price that may be charged by a utility. For example, in a case involving the Ohio Bell Telephone Company, the Ohio Supreme Court determined that to regulate the rates in question the Public Utilities Commission of Ohio ("PUCO") must undertake an elaborate six-step inquiry to determine a reasonable rate of return, appropriate costs to be included, project likely revenues, before it may set, prescribe or fix a rate. *City of Cleveland, et al. v. Public Utilities Commission of Ohio*, 164 Ohio St. 442, 443-444 (1956).

For example, both the PUCO and the FCC have frequently determined that a "fair" or reasonable rate provides a profit of approximately ten to twelve percent. *See, e.g., In Re Cincinnati Bell Telephone Co.*, PUCO Case No. 96-899-TP-ALT, 1999 WL 1295929 (Nov. 4, 1999) (requiring and prescribing prices to return reasonable profit of 9.56%); *MCI Tel. Corp.*, 59 F.3d at 1410 (setting maximum rate of return at 12% for overall earnings and each component).

C. Ohio Abolished Cellular Rate Regulation in 1985.

In the 1970s and early 1980s, the providers of cellular service were required to submit their rates to the PUCO for the its approval. In 1985, the PUCO eliminated any requirement that cellular providers could only charge "reasonable" rates or earn only a "fair" profit. *In the Matter of the Commission Investigation Into the Regulatory Framework for Telecommunications Services in Ohio*, PUCO Case No. 84-944-TP-COI, *Opinion and Order* (April 9, 1985) (the "944 Order"). That order gave cellular providers unlimited discretion to set their own rates, to charge rates in excess of a "reasonable" rate, to charge whatever rates the market would bear, and to earn profits in excess of a "fair" return. The PUCO required only that these companies permit competition in the marketplace from independent or "unaffiliated" retailers

who could purchase wholesale cellular service from the Petitioner's wholesale operations.

The 944 Order first set forth Ohio's requirement that cellular licensees, including Petitioner, maintain separate operations with respect to the wholesale and retail sides of their respective businesses. In the 944 Order, the PUCO stated:

> cellular resellers which are affiliated with the underlying carrier do not . . . fall within the statutory definition of a telephone company, provided the affiliated resellers' operations (which consist of marketing of cellular service as opposed to the actual provision of cellular service) are maintained under a separate set of accounting records from the operations of the underlying carrier, and further provided the affiliated reseller has no involvement whatsoever in the wholesale operations of the underlying carrier (other than as a customer on equal terms as any non-affiliated cellular reseller).

On October 22, 1993, the PUCO issued its *Finding and Order* in the case captioned *In the Matter of the Commission Investigation Into Implementation of Sections 4927.01 through 4927.05 Revised Code, as They Relate to Competitive Telecommunications Services,* PUCO Case No. 89-563-TP-COI ("563 Case"). In its *Finding and Order* in the 563 Case, the PUCO maintained its requirements first promulgated in the 944 Case.

Under Ohio law, the "reasonableness" of the rates or the "fairness" of the return became entirely irrelevant. Petitioner has a right to charge "unreasonable" or "extortionate" rates and has never been subject to an inquiry of its rate of return, costs or profit margin. However, once the Petitioner exercised its unfettered discretion to set rates, these rates must be made available to all takers. Resellers could not be excluded from these rates. Thus, while Ohio law has not regulated cellular ***rates*** since 1985 (*i.e.* "unreasonable rates" are irrelevant), it continued to regulate anti-competitive ***conduct*** and continued to prohibit "unreasonable ***discrimination***." This

distinction between unreasonable rates and unreasonable discrimination has been recognized since 1887 in the Cullom Report, the Interstate Commerce Act, the Telecommunications Act and Ohio law.

III. PETITIONER SOUGHT AND ACCEPTED THE BENEFITS OF THE OHIO RULES.

Not only was Petitioner permitted to enter the Ohio market, it was the very first company to do so. On May 7, 1985, Petitioner's Vice President and Chief Financial Officer, Dennis Hackl, submitted a sworn affidavit to the PUCO (a prerequisite to obtain operating authority in Ohio)[4] in which he acknowledged Petitioner's obligations under the 944 Order and agreed to abide by them. In this regard, Hackl swore that:

> Retail Cellular Service is offered by a separate, unincorporated, division. . . which purchases the service from [Petitioner] pursuant to tariff and on the same terms and conditions available to competing resellers and resells the service to end users. The Retail Division is not involved in the transmission of messages either through operation or managerial direction.

In the Matter of the Application of Cincinnati SMSA Limited Partnership for a Certificate of Public Convenience and Necessity to Provide Domestic Public Radio Telecommunications Service in the Greater Columbus Metropolitan Area, PUCO Case No. 84-1224-RC-ACE, Hackl Affidavit at ¶6.[5] In addition, while Cellnet proved that Petitioner's wholesale operation did not account for any revenue from sales to Petitioner's retail operation, Petitioner swore to the PUCO that it would follow this basic tenet of the 944 Order when Hackl stated

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[4] In Ohio, in 1985, Petitioner was required to obtain a Certificate of Public Convenience and Necessity before it could offer service in the state.

[5] Petitioner filed the same Affidavit in support of its certification in Cincinnati and Dayton. PUCO Case Nos. 83-1308-RC-ACE and 84-1225-RC-ACE.

> Each Wholesale Carrier [i.e. Cincinnati, Columbus and Dayton] separately records its revenues, based on its terms and conditions, from invoices sent to its customers (including the Retail Division).

Id. at ¶8(E). Likewise, Hackl swore that

> The direct costs of the Retail Division include charges from [Petitioner's Wholesale operations] for the purchase of wholesale cellular service as well as commissions payable to CPE Sales Co. [another Petitioner affiliate] and other authorized cellular service sales agents.

Id. at ¶8(G)(1). Thus, it is clear that Petitioner knew precisely how to comply with the 944 Order; its own affidavit virtually matched the requirements of that Order.

In granting the Certificate, the PUCO stated:

> In that the retail division of the applicant's business keeps separate accounting records, and operates independently from the wholesale operations of the applicant on the same terms as any non-affiliated reseller of the applicant's cellular services, such retail division is not subject to Commission jurisdiction.

Id., *Entry* (May 21, 1985). Based upon these representations, Petitioner's retail operations were deregulated, freed from any rate cases, detariffed, and exempted from utility taxes on over $800 million of retail revenue.

On October 22, 1993, the PUCO reaffirmed the policies set in the 944 Order when it issued the 563 Order.

IV. UNDER 47 U.S.C. § 332 ("§ 332"), CONGRESS REAFFIRMED THAT STATES CAN REGULATE "OTHER TERMS AND CONDITIONS."

In the early 1990s, some states other than Ohio, including notably California, were regulating the rates charged by cellular carriers. These states, unlike Ohio, required that reasonable retail rates be approved in advance by state public utility commissions. In contrast, since 1985, Ohio had permitted cellular carriers to charge any rate – reasonable or unreasonable – they wished.

In 1993, Congress enacted § 332 which states, in pertinent part, that as of August 10, 1994:

> No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service **except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.** (Emphasis added.)

A. Legislative History of § 332 Shows That Congress Reserved to States the Right to Ensure That Wholesale Capacity Was Made Available to Cellnet.

The legislative history of § 332 expands on the express limitation on preemption contained in the statute by showing that Congress did not intend to preempt all state regulation of cellular services. In this regard, Congress stated:

> [I]t is the intent of the Committee that the states still would be able to regulate the terms and conditions of these [cellular telephone services]. By 'terms and conditions' the Committee intends to include such matters as customer billing information, and practices and billing disputes and other consumer protection

> matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment, and **the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority.** This list is intended to be illustrative only and is not meant to preclude other matters generally understood to fall under 'terms and conditions.' (Emphasis added.)

H.R. Rep. No. 103-111 at 261 (1993). Moreover, the Senate adopted the same perspective of §332 stating that:

> Section 332(c)(3)(A) of the Senate Amendment is identical to the House provision except that it explicitly recognizes that **nothing in this subparagraph exempts providers of commercial mobile services . . . from requirements imposed by a state commission on all providers of telecommunications services necessary to ensure the continuing availability of telephone exchange services at affordable rates.** (Emphasis added.)

H.R. Conf. Rep. No. 103-213 at 492-93 (1993). The Senate Amendment was later adopted in the Conference Agreement. *Id.* Cellnet is a wholesaler who was being denied the availability of "services at affordable rates." Ohio's right to protect Cellnet's rights is specifically set forth in the legislative history.

Cellnet is a purchaser of wholesale service. Cellnet proved at trial before the PUCO that Petitioner denied Cellnet wholesale capacity by charging Cellnet full price while giving free service to Petitioner's own affiliated reseller. It was obvious to the PUCO and the Ohio Supreme Court that Petitioner cannot do indirectly that which it cannot do directly.

B. FCC Concludes That Ohio Was "Not Regulating Rates Charged."

Section 332 also included a "grandfathering" clause which permitted states to regulate "rates charged" and/or "market entry" if the state could prove to the FCC that it had "any regulation concerning the rates for any commercial mobile radio service in effect as of June 1, 1993." *Id.*

Even though it was not then regulating rates, Ohio wanted to protect both its current regulations prohibiting discriminatory conduct and its future right to regulate rates. Ohio submitted a petition specifically informing the FCC that pursuant to the statutes and the 944 and 563 Orders cited above, Ohio was "using its complaint authority to ensure that the rates of a cellular wholesaler are not unduly discriminatory, preferential to affiliates, or anticompetitively set below cost." *In the Matter of the Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842 (F.C.C. May 19, 1995) ("Ohio Order"). Ohio wished to be able, if necessary, to regulate rates in the future. The FCC denied Ohio's petition on the primary grounds that it did not qualify for the grandfathering clause because Ohio's complaint authority and policies against discrimination did not amount to the regulation of "'rates charged' by any CMRS provider in that state as of June 1, 1993." *Id.* at ¶ 31.[6]

V. THE CELLNET COMPLAINT.

On October 18, 1993, Cellnet filed PUCO Complaint No. 93-1758-RC-CSS (the "Cellnet Complaint" or the "Cellnet Case") against, *inter alia*, Petitioner. *Westside Cellular, Inc. d/b/a Cellnet v. GTE Mobilnet of Ohio, et al.*, PUCO Case No. 93-1758-RC-

[6] Both Petitioner and the PUCO were parties to this case which the FCC determined was an adjudication on the merits. Ohio Order at ¶ 31 (deciding "Case on the Merits") and fn. 114 (noting that "this is an adjudicatory type proceeding, not a rulemaking").

CSS.[7] The Cellnet Complaint, as amended, alleged six separate counts against Petitioner. Cellnet alleged that Petitioner: failed to maintain separate retail operations or accounting (Count I); established rates that it provided to its own retail affiliate but which it denied to Cellnet (Count II); unlawfully cross-subsidized its retail affiliate (Count IV); violated Ohio Revised Code § 4905.33 and Ohio Revised Code § 4905.35 (Count V); denied Cellnet wholesale service (Count IX); and damaged Cellnet as a result of the unlawful conduct (Count X). Through all of these Counts, the crux of the Cellnet Case was that Petitioner engaged in anti-competitive conduct and unlawfully discriminated against Cellnet.[8]

VI. PETITIONER'S PREEMPTION ARGUMENT HAS PREVIOUSLY FAILED.

Petitioner moved to dismiss Cellnet's Complaint on several grounds including that Ohio law was preempted by § 332. On March 23, 1995, the PUCO rejected Petitioner's claims and held that Cellnet's discrimination claims fall within the "other terms and conditions" that are expressly reserved to the states by § 332. *Entry*, March 23, 1995 at ¶ 5. Moreover, the PUCO held that even if the FCC determined that the PUCO's complaint authority was preempted, the PUCO would still retain jurisdiction over violations and damages caused before any preemption became effective in 1995. *Id.* State authority would be preempted, if at all, only after the FCC finally adjudicated Ohio's Petition to retain its right to directly regulate retail rates which was August 3, 1995. On reconsideration, the PUCO observed that "[i]t is important to note that [§ 332] purports to affect state rate and market entry provisions [,] not allegations concerning unjust, unreasonable and discriminatory conduct. The allegations raised by Cellnet clearly affect the terms and conditions of service provided by the respondents - issues specifically reserved to state authorities by [§

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[7] With the dismissal without prejudice of GTE Mobilnet in 1999, the caption of the case has changed to *Westside Cellular, Inc. d/b/a Cellnet v. New Par, et al.*

[8] For a detailed description of Cellnet's claims, *see GTE Mobilnet v. Johnson*, 111 F.3d 469, 472-473 (6th Cir. 1997).

332]." PUCO Case No. 93-1 758-RC-CSS, *Entry on Rehearing*, April 13, 1995 at 6, n. 4.

Petitioner's Co-Respondents, New Par n/k/a Verizon and GTE Mobilnet n/k/a Verizon (collectively, Co-Respondents) then sought an injunction from the United States District Court for the Southern District of Ohio to prevent the PUCO from hearing Cellnet' s claims. Curiously, Petitioner failed to join its Co-Respondents in the Southern District action. The District Court ruled that Cellnet's bundling claims against Co-Respondents were not preempted, but otherwise found in favor of Co-Respondents. *GTE Mobilnet*, 111 F.3d at 480 fn. 14.

A. The Sixth Circuit Rejected Petitioner's Broad Preemption Claim.

Cellnet's case reached the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") which, in denying the claims of § 332 preemption, correctly recognized that "Cellnet's complaint alleges several violations of Ohio law and Commission orders, that together are intended to ensure that services provided by cellular earners operate in a fair and nondiscriminatory manner." *GTE Mobilnet*, 111 F.3d at 477. The Sixth Circuit reversed and remanded the District Court's ruling, and thus established the right of the PUCO to adjudicate the merits of Cellnet's claims. *Id.* The only holding that was not reversed was the District Court's finding that Cellnet's claims for denial of service and bundling were not preempted.

The Sixth Circuit explained the essence of Cellnet's Complaint and the scope of Ohio law: "Under Ohio law, it makes no difference if the rate charged is two cents a minute or twenty dollars a minute, as long as affiliated resellers are charged at the same rates as unaffiliated resellers." *Id.* The Sixth Circuit based its decision to abstain on its express finding that §332 did not exhibit Congress' clear intent to preempt Cellnet's case. *Id.* at 480.

B. The PUCO Again Rejects Preemption Under § 332.

Following the Sixth Circuit's Opinion, Petitioner again moved the PUCO for dismissal of Cellnet's Case based primarily on preemption. The PUCO once again rejected Petitioner's preemption claims and held that Cellnet's claims pertaining to Petitioner were not preempted since they fell within the state's power to regulate "other terms and conditions."

In January and February 1999, the PUCO conducted a three-week evidentiary hearing on the Cellnet Complaint. The PUCO heard testimony from employees of Petitioner and Cellnet, as well as from expert witnesses.

On January 18, 2001, after nearly two years of careful consideration, the PUCO issued its Opinion and Order in which it found in favor of Cellnet as to seven of the eight counts and four of the six counts pertaining to Petitioner. The PUCO ruled in favor of Cellnet as to Counts I, II, III, IV,[9] V, VI and IX. The PUCO ruled that Petitioner had discriminated against Cellnet and violated PUCO regulations and Ohio statutes. *Id.*

Although Petitioner swore to comply with the Orders, and has continued to take advantage of the resulting deregulation, Petitioner once again claimed that these laws are invalid because they are preempted.

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[9] The PUCO did not find in favor of Cellnet as to any claims made in Count IV against Ameritech.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CASE OR CONTROVERSY BECAUSE THE UNDERLYING CASE HAS BEEN SETTLED AND DISMISSED WITH PREJUDICE, AND WAS BASED UPON OHIO LAW THAT WAS REPEALED IN 1999.

A. Article III Limits Appellate Jurisdiction to "Actual Ongoing Cases or Controversies."

Under Article III, this Court's "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco*, 375 U.S. 301, 306 n.3 (1964); *see, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (The Court "may adjudicate only actual ongoing cases or controversies"); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *DeFunis v. Odegaard*, 416 U.S. 312, 316-320 (1974) (*per curiam*). *Federal Election Commission v. Akins*, 424 U.S. 11, 12 (1998). Article III's limitation of judicial power to cases and controversy "'means that [Petitioner]must show, among other things, an injury-in-fact, a requirement that helps assure that courts will not pass upon . . . abstract, intellectual problems,' but adjudicate 'concrete, living contests between adversaries.'" *Id.* at 20.

B. There Is No "Actual Ongoing Case or Controversy" Because All Disputes Have Been Settled and Dismissed with Prejudice.

Pursuant to Article III, settlement of a claim before appeal moots the claim and deprives the federal judiciary of jurisdiction over the claim. *U.S. ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. 2002); *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001) (holding that settlement of a dispute renders moot any appeal growing out of that dispute); *Kimberly-Clark Corp. v. Procter & Gamble Distributing Co., Inc.*, 973 F.2d 911 (Fed. Cir. 1992),

(holding that settlement of a dispute renders appeals moot); *In re United States*, 927 F.2d 626 (D.C. Cir. 1991) (case rendered moot and non-justiciable where parties settled suit by agreement reached after Petition for Writ of Certiorari had been filed in Supreme Court); and *Affholder, Inc. v. Preston Carroll Co., Inc.*, 866 F.2d 881 (6th Cir. 1989) (settlement of claim before final adjudication moots claim and deprives federal judiciary of jurisdiction). Similarly, in *Honig v. Doe*, 484 U.S. 304 (1988), the Court held that "under Article III of the Constitution, this Court may only adjudicate actual, ongoing controversies . . . that the dispute ***between the parties was very much alive*** when the suit was filed . . . cannot substitute for the actual case or controversy that an ***exercise of this Court's jurisdiction requires***." (Emphasis added).

Here, Petitioner and Cellnet have fully and finally settled all claims between them. By Order April 2, 2003, Ohio Judge Timothy J. McGinty recognized the settlement and dismissed with prejudice all claims between the parties. *See, also* Petitioner's Brief at 15 (conceding that the case has been settled). Indeed, just weeks after signing a Confidentiality Agreement, Petitioner's minority partner Convergys issued a press release announcing that a settlement had been reached for $22 million. Thus, there is no "actual ongoing case or controversy to adjudicate." Under well-settled law, the United States Supreme Court does not entertain settled cases. Indeed, there is no Article III jurisdiction over such moot cases. Therefore, the Petition should be denied because there is no case or controversy.

C. There Is No Case or Controversy Because the Ohio Rules Were Repealed Effective December 31, 1999.

Moreover, this Court has consistently refused to interpret state statutes which have been repealed on the grounds that it does not issue advisory opinions. *Roth v. Delano*, 338 U.S. 226 (1949) (declining to render an advisory opinion where Michigan state statute had been repealed); *Naylor v. Superior Court of State of Arizona in and for Maricopa County*, 558 F.2d 1363 (9th Cir.

1977) (holding that issuing an opinion on repealed statute would constitute a prohibited advisory opinion).

Here, the Ohio Rules in question have been repealed. *In the Matter of the Commission Investigation into Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC Lexis 745 (Dec. 16, 1999) (repealing the underlying Ohio Rules as of December 31, 1999, but permitting Cellnet's case for past damages to go forward); *see, also* Petitioner's Brief at 9, fn. 3 (conceding that the Ohio Rules have been repealed). Because the Ohio Rules have been repealed, Petitioner's writ is little more than a request that this Court issue an advisory opinion. This Court should not entertain a case in a dispute that has been settled and which arises from a law that has been repealed. Petitioner's Writ for Certiorari should be denied.

D. Petitioner Has Failed to Make Any Showing Even of a Speculative Chance of Future Controversies.

Because Petitioner cannot show that there is presently any ongoing case or controversy, Petitioner instead speculates that future unnamed plaintiffs may possibly bring claims. Petitioner does not even identify these phantom plaintiffs. Without such specificity, Petitioner cannot show that it is at risk now or in the future.

II. PETITIONER LACKS STANDING

A. Petitioner Lacks Standing As to Any Claim Because Petitioner Cannot Accept the Benefits of a Law for 18 Years and Then Complain That the Law Is Invalid.

The Ohio Rules deregulated Petitioner, lowered Petitioner's taxes, and eliminated any requirement for filing tariffs. The Ohio Supreme Court noted that:

> [Petitioner] actively participated in the commission proceedings that resulted in the 563 orders and submitted comments to the commission that urged the commission to adopt the streamlined regulations contained in the order. Additionally, shortly after the 944 order was adopted, [Petitioner's] predecessors-in-interest applied for and received from the commission certificates of convenience and necessity to operate as deregulated cellular telecommunication service providers. In connection with each of their applications, the applicant provided to the commission an affidavit agreeing to comply with the very requirements of the 944 order that [Petitioner] now challenge[s] as being overly vague. Moreover, it is undisputed that [Petitioner has] accepted and enjoyed a number of benefits that flowed from the deregulation of retail cellular service providers pursuant to the 944 and 563 orders.

New Par v. Pub. Util. Comm., Ohio St. 3d ___, 2002 Ohio 7245, ¶15 (2002). By accepting the benefits of these Orders, Petitioner is estopped from challenging their validity. *United States v. San Francisco*, 310 U.S. 16, 29 (1940) (a party is equitably estopped from challenging the validity of a law the benefits of which it has retained.) As the Supreme Court observed in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936), "[t]he Court will not pass upon the constitutionality of a statute at the

instance of one who has availed himself of its benefits." Later, in *Fahey v. Mallonee*, 332 U.S. 245 (1947), the Court reiterated, "[i]t is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'" *Fahey*, 332 at 255 (*citing United States v. San Francisco*, 310 U.S. at 29). The Supreme Court concluded that "[i]t would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped form questioning the validity of its vital conditions." *Id.* at 256. Petitioner lacks standing to suddenly dispute the validity of laws that it eagerly supported for eighteen years.

B. Petitioner Lacks Standing to Bring a Claim Regarding Market Entry.

1. No Injury in Fact as to Market Entry Because Petitioner Was the First to Enter the Ohio Market.

In order to establish Article III standing, a plaintiff must demonstrate "injury in fact," a harm that is both concrete and actual or imminent, not conjectural or hypothetical causation, a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant, and he must demonstrate redressability, a substantial likelihood that the requested relief will remedy the alleged injury in fact. *Vermont Agency of Nat. Resources v. U.S.*, 529 U.S. 765 (2000). Petitioner cannot possibly claim standing to argue that Ohio's rules regulated market entry because Petitioner was the very first market entrant. From 1985 to the present, Petitioner has been active in the Ohio market.

2. Petitioner Failed to Preserve Any Claim Relating to Market Entry.

In any event, Petitioner was required to raise this issue on re-hearing to the PUCO. Ohio Revised Code § 4905.10 (issues must be raised on rehearing in order to preserve right to appeal decision

of PUCO). Petitioner failed to do so. Having failed to preserve the issue at the PUCO, Petitioner cannot raise it now. *TRW Inc. v. Andrews*, 534 U.S. 19 (2001).

III. NO CONFLICT EXISTS BETWEEN THE OHIO SUPREME COURT DECISION AND ANY OTHER FEDERAL OR STATE AUTHORITY.

A. No Direct Conflict Exists.

Petitioner cannot cite a single case – federal, state or administrative – which holds that 47 U.S.C. § 332 prevents states from adjudicating claims of discriminatory conduct. As discussed below, every entity that has addressed this issue has held in Cellnet's favor.

B. No Conflict with the Sixth Circuit Which Rejected Petitioner's Claim That Congress Intended to Preempt Cellnet's Claims.

As stated *supra*, this matter has already reached the Sixth Circuit, and that court rejected the argument that § 332 evinced a clear intent to preempt Cellnet's case. *GTE Mobilnet*, 111 F.3d 469. In order to even reach its ultimate abstention decision, the Sixth Circuit made specific and necessary findings about the preemptive effect of § 332. The Sixth Circuit focused on the language used in § 332 and stated:

> On its face, the preemptive reach of section 332 is limited. The statute preempts states from regulating market entry and rates charged, **but specifically allows states to regulate 'other terms and conditions' of service.** (Emphasis added.).

Id. at 477. The Sixth Circuit then focused on the legislative history quoted above and recognized that:

> The House report provides a list of examples of matters that fall within the phrase 'other terms and conditions,' **but specifies that the list is 'illustrative only and not meant to preclude other matters as fall within a state's lawful authority.'** (Emphasis added.)

Id. Given the language of § 332 and the legislative history, the Sixth Circuit was to quick to find that its "inquiry must focus on whether Cellnet's complaint requires the Commission to regulate market entry or rates charged, or whether it falls into the sphere of "other terms and conditions.'" *Id.* The Sixth Circuit foreclosed any argument that there was any "clear and manifest" intent to preempt within § 332 when it stated that:

> We cannot conclusively determine whether the language of section 332 refers to simply setting rates or whether it refers to any type of adjustment to rates, no matter how indirect.

Id. at 478. Certainly if the intent "cannot [be] conclusively determine[d]," it cannot be "clear and manifest."

Petitioner argued that it was the FCC's intent to use market forces to prevent unreasonable discrimination and that there is no place for the states to engage in a determination of what constitutes unreasonable discrimination. The Sixth Circuit disagreed. It "reject[ed] the district court's conclusion that the plain language of [§ 332] reflects Congress' clear intent to preempt the states' authority to control discriminatory rates" and put the matter to rest by stating that:

> [§ 332] . . . **does not seem to suggest that states may no longer adjudicate individual cases of anti-competitive or discriminatory misconduct.** (Emphasis added.)

Id. at 480. Accordingly, the Sixth Circuit held that the PUCO was not facially preempted from adjudicating Cellnet's claim. *Id.* at

478. Thus, even though the Sixth Circuit ultimately abstained from reaching the question of the precise scope of preemption under § 332, it based its decision on a necessary finding that there is no clearly manifested congressional intent to preempt Ohio from continuing to exercise its police power to hear Cellnet's claims. *Id.* at 478-480.

C. No Conflict Exists with Any Other Federal Circuit.

There is no conflict with the decisions of any other federal circuit. As the Sixth Circuit recognized in rejecting Petitioner's preemption argument, the issues presented in the Cellnet Case are virtually identical to those addressed by the Ninth Circuit Court of Appeals in *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298 (9th Cir. 1995); *GTE Mobilnet*, 111 F.3d at 478. In *Total TV*, the Ninth Circuit held that although the Federal Cable Act, 47 U.S.C. 521, *et seq.*, preempted the states from regulating cable television rates, it did not prevent the plaintiff from bringing an action in California state court alleging that a cable franchise was engaging in below-cost pricing with the intent to destroy competition in violation of California statutes prohibiting such conduct. *Total TV*, 69 F.3d at 300.

The similarities between *Total TV* and the instant case are striking. In *Total TV*, the Federal Cable Television Act at issue states, "**no federal agency or state may regulate the rates for the provision of cable service.**" 47 U.S.C. 543(a)(1). In the instant case, § 332 states, in pertinent part, "**no state or local government shall have any authority to regulate. . . the rates charged by commercial mobile service.**" 47 U.S.C. 332(c)(3)(A). Both preemptive provisions are contained in Title 47, the statutory scheme for FCC issues.

Total TV and the instant case are identical in every meaningful way. The state statutes and the allegedly preemptive federal statutes are virtually identical. The Sixth Circuit has recognized that Cellnet's Case and *Total TV* are analogous. *GTE*

Mobilnet, 111 F.3d at 478. The results should also be the same - there is no preemption of Cellnet's Case.[10] Moreover, there is clearly no conflict that would justify a petition for *certiorari*.

D. No Conflict Exists with the Federal Communications Commission.

1. FCC Held That the Ohio Rules Did Not Constitute "Any Regulation Concerning Rates."

When Congress enacted § 332, it included a "grandfather" clause that "**if a State had 'any regulation' concerning the rates** for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994." Ohio Order, 10 F.C.C.R. 7842, 1 3 (1995) (emphasis added).

In 1994, the PUCO petitioned the FCC for the authority to continue to regulate Petitioner and other CMRS providers, even though it believed that it was not then regulating "market entry" or "rates charged." *Id.* In its request for rehearing, the PUCO identified the facts and circumstances of the Cellnet Case and specifically informed the FCC that among its regulatory activities, the PUCO:

---

[10] *Cable Tel. Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992) is also analogous to this case. Like the defendants in Total TV, the Appellants in Finneran relied upon the express language of 47 U.S.C. 543, the Cable Act, in arguing that state action preempted the entire field of regulation. The Cable Act as it deals with preemption, closely mirrors § 332. In affirming the state's right to impose regulations, the court in *Finneran* reasoned that Congress did not intend "to reach everything that relates to rate regulation." *Id.* at 102. Instead, the court held, Congress only meant to preempt rules that regulate rates for the provision of service to customers.

> **does use its complaint authority** under Sections 4905.26, 4905.33 and 4905.35, Revised Code **to ensure that rates of a cellular wholesaler are not unduly discriminatory, preferential to its affiliates**, or set below cost for the purpose of inhibiting competition. (Emphasis added.)

Ohio Petition, FCC Case No. 94-109. The PUCO specifically placed before the FCC the issue of whether Cellnet's complaint could be adjudicated.

On rehearing, Petitioner's co-defendants, New Par and GTE Mobilnet, specifically demanded that the FCC order the PUCO to stop adjudicating Cellnet's complaint. Ohio Petition, Order on Reconsideration at ¶¶ 17-18. The FCC declined to do so.

Instead, the FCC reiterated its findings that Ohio was not "regulating the rates charged" as required to qualify for the grand fathering clause. The FCC continued on to state that "[w]e view the statutory "other terms and conditions" language [contained in § 332] as sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints concerning such matters. . . ." *Id.* at ¶ 43. The FCC went on to state that 'nothing in [§ 332] indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe that **Ohio retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS** [i.e. cellular] providers in that state." *Id.* at ¶ 44 (emphasis added).

The FCC knew that the PUCO "posessed authority under state law" to adjudicate Cellnet's complaint. According to the FCC, Ohio retained that authority. Most importantly, like the Sixth Circuit and Congress, the FCC has held that the "other terms and conditions" language of § 332 is "sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints concerning such matters." *Id.* at ¶ 43. The Ohio Supreme Court ultimately agreed.

2. Petitioner's Changing Story: First, It Requested an FCC Ruling That There Was No Prior Decision. Now, It Claims There Is a Conflict.

In 2003, after having lost at the Ohio Supreme Court and eight years after the FCC refused to stop the Cellnet claim, Petitioner approached the FCC's Wireless Telecom Bureau desperately seeking relief. Petitioner argued that the FCC had ***never*** ruled on whether states were preempted from prohibiting discrimination. At Petitioner's request, the Wireless Telecom Bureau issued a non-binding letter that stated:

> Based on its review of prior [FCC] decisions, the Bureau believes that the [FCC] has to date declined to decide whether state determination of claims that CMRS providers have engaged in rate discrimination would constitute prohibited rate regulation, or would instead constitute permitted regulation of other terms and conditions under Section 332(c)(3)(A). Instead, the effect of the [FCC's] orders on this issue to date has been to leave such questions for potential future consideration on a case-by-case basis.

Letter of Wireless Telecom Bureau, 18 F.C.C.R. 6522 (April 8, 2003). Petitioner cannot now turn around and suddenly claim that the FCC has "repeatedly rejected state request for regulatory authority to address rate discrimination" when Petitioner has previously claimed that the FCC had made no prior decision. Similarly, the FCC's "consideration on a case-by-case basis" means that there can be no great precedential value or conflict with other cases. Because every case is determined *sui generis*, there can be no conflict with any other case.

E. Federal Courts Agree That State Authority Is Not Generally Preempted by § 332.

District courts have also consistently construed § 332's preemption provisions narrowly and have found that state law is not preempted. In *Westside Cellular, Inc. v. New Par*, Case No. 1:01CV505 (N.D. Ohio 2001), Judge Economus ruled that Cellnet's claims were not completely preempted and remanded Cellnet's case to the Ohio trial court. *See also, Russell v. Sprint Corp.*, 2003 WL 21212134 (D. Kans. May 22, 2003); *See, e.g., TPS Utilicom Servs., Inc. v. AT & T Corp.*, 223 F.Supp.2d 1089, 1096 (C.D. Cal. 2002); *Bell Atlantic Mobile, Inc. v. Zoning Bd. of Butler Township*, 138 F.Supp.2d 668, 676077 (W.D. Pa. 2001) (§ 332 does not support complete preemption); *Bryceland v. AT & T Corp.*, 122 F.Supp.2d 703, 706-10 (N.D. Tex 2000) (§ 332 does not support complete preemption); *Aronson v. Sprint Spectrum, L.P.*, 90 F.Supp.2d 662, 664-69 (W.D. Pa. 2000) (same); *Sanderson, Thompson, Ratledge & Zimny v., AWACS, Inc.*, 958 F.Supp. 947, 952-58 (D. Del. 1997) (same).

F. No Conflict Exists with This Court's Holding in *Abilene*.

1. On Its Face, *Abilene* Excludes Discrimination Claims.

Petitioner relies heavily on *Texas & Pac. Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) ("*Abilene*") (holding that a claim for ***discrimination*** was not preserved on appeal and that a claim for unreasonable ***rates*** was barred by the Filed Rate Doctrine). In *Abilene*, this Court explicitly excluded the issue of unreasonable discrimination:

> As nothing in these conclusions relates to the averments of discrimination, undue preference, or a greater charge for a shorter than for a longer haul, those suggest, it may be assumed, or considered to have been eliminated in the course of the trial.

Id. at 432. Petitioner cites a case that explicitly states that it is irrelevant to issues of discrimination. *Id.* Thus, there cannot possibly be any conflict with this Court's holding in *Abilene* because *Abilene* does address any claims of discrimination.

2. Petitioner's Filed Rate Cases Are Irrelevant Because There Are No Filed Rates for Cellular Services.

Moreover, *Abilene* and its progeny are also inapposite because they are based upon the Filed Rate Doctrine. In *Ting v. AT&T*, 319 F.3d 1126, 1139 (9th Cir. 2003), the court noted that cases based upon the Filed Rate Doctrine are not relevant in industries where no tariffs are filed. In *Ting*, the Ninth Circuit held that:

> To establish that § 202(a) contains an independent statement of uniformity, AT&T relies on *Central Office*, 524 U.S. 214, 118 S.Ct. 1956, 141 L.Ed.2d 222, as well as several cases arising under the Interstate Commerce Act, on which the 1935 Act was modeled. *See, e.g, Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). In all of these cases, however, the regulatory scheme at issue included some form of a federal tariff filing requirement, even though the requirement at times was voluntary. By contrast, the current environment is completely detariffed and highly competitive. AT&T's heavy reliance on *Central Office* is similarly misplaced. That case focuses narrowly on the issue of the preemptive scope of the filed-tariff doctrine. 524 U.S. at 216, 118 S.Ct. 1956 ("The issue before us is whether the federal filed-tariff requirements of the Communications Act preempt respondent's state-law claims."). It provides no support for AT&T's argument that after detariffing state contract and consumer protection laws restricting

> AT&T's ability to impose 1140 the terms of its CSA on consumers are preempted.

Id. There are no filed rates in Ohio for cellular providers. Thus, Petitioner's list of cases from tariffed industries is irrelevant.

G. Petitioner Repeatedly Cites Cases That Have Been Reversed or Rejected.

Curiously, Petitioner relies on numerous cases that have no legal weight here. First, as noted above, Petitioner relies primarily on *Abilene* for a proposition that is totally unrelated to ***discrimination***. Then, Petitioner outrageously relies on the District Court's Opinion in *GTE Mobilnet v. Johnson*, No. C2-95-401, unreported (S.D. Ohio 1995) to claim that "recent federal and state judicial and administrative decisions construe the pre-emptive scope of § 332 broadly." Petitioner's Brief at 21. In fact, the Sixth Circuit reversed this finding. The only part of the District Court's Opinion that remains good law is its finding that Cellnet's claims for illegal bundling are ***not*** preempted. *GTE Moblinet*, 111 F.3d at 480 fn. 14.

Petitioner also relies on *Bryceland v. AT & T Corp.*, 122 F.Supp.2d 703,709 (N.D. Tex 2000). Petitioner fails to disclose that, upon remand, the state court held that § 332 did not pre-empt state law claims. *Bryceland v. At & T Corp.*, 2002 WL 31688961 (Ct. App. Tex. Dec. 3, 2002). Indeed, *Bryceland* reaffirms the fact that § 332 preemption applies only "if the fact finder is required to prescribe, set or fix wireless rates." *Id.* at *2. Thus, *Bryceland* agrees with the proposition that rate discrimination cases are not pre-empted because it is the carrier, not the court, that sets the rate.

IV. PETITIONER FALSELY REPRESENTS THE "NATIONAL" IMPORTANCE OF THIS CASE.

A. This Case Does Not Involve the Interstate Sale of Cellular Service.

There is no question that Ohio has the authority to regulate utilities, including telephone companies, which operate within Ohio's borders. *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 164 (6th Cir. 1973). Here, Petitioner argues that since "(Petitioner) operates in interstate commerce" the PUCO was preempted from hearing this case.

There is no evidence that Cellnet sought interstate cellular service. Cellnet is an Ohio company doing business in Ohio. Petitioner, while it may have assets in Ohio and Kentucky, was licensed by the PUCO to provide cellular service within the state of Ohio. Ohio service is the service that Cellnet requested. Petitioner has presented no facts which would allow the Court to conclude that the service being sought by Cellnet was interstate in nature. If it were merely the partial location of facilities in another state that allowed a determination of "interstate" preemption, then no doubt Petitioner would be claiming that its partner, Convergys should be exempt from any and all PUCO regulations because it too has facilities in both Ohio and Kentucky. To hold in favor of Petitioner on this issue based solely on the existence of assets in another state would mean that Ohio could not regulate any public utility which has assets in another state. This would eliminate regulation over virtually every large public utility in Ohio.

In order for this Court to find interstate preemption, it would be necessary to examine the factual record to establish that the services which Cellnet sought are interstate in nature. In *Alascom, Inc. v. F.C.C.*, 727 F.2d 1212 (D.C. Cir. 1984), the court held that "the resolution of FCC pre-emption issues is not a purely legal question, but also involves factual questions as to the scope of the FCC's jurisdiction, and the nature and scope of the state regulation involved." Here, however, there is no evidence in the record that

the service being sought by Cellnet was interstate in nature. Without that evidence, Petitioner cannot establish that any of the services at issue are interstate in scope and thus could, even theoretically, be preempted.

B. Petitioner's "Parade of Horribles" Is Simply Untrue.

In an attempt to inflate the importance of this case and explain why it was "forced to settle," Petitioner repeatedly suggests that it was subject to $1 billion in damages to Cellnet. This is a gross distortion of the truth. Cellnet's claims never reached $1 billion. In fact, the amount Cellnet claimed was never even enough for Petitioner's parents, SBC and Bell South, to consider it sufficiently material to disclose to their own shareholders as required by SEC rules. Petitioner was not willing to tell its public shareholders that this was a material risk to a single company, yet it wants this Court to believe that Cellnet's claim is important to the entire nation. If Cellnet's claim was not material to Petitioner's own shareholders, Cellnet's claim is surely not material to America.

Cellnet also notes that even though Petitioner entered into an agreement on April 2, 2003 to keep the terms of settlement confidential, Petitioner's partner Convergys sent out a press release on April 18, 2003 reporting that Petitioner had settled for $22 million. *See*, www.Convergys.com/news_results.php?newsid=706. Astonishingly, Convergys claimed that "it was unaware of this settlement until so informed by" Petitioner. *Id.* Apparently, Petitioner did not believe that Cellnet's claim was even sufficiently material to inform its own partner of the potential risk. If Cellnet's claim was not important enough to inform Petitioner's own partner or shareholders, it is not important enough for a writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

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(3)

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No. 02-1711

In The Supreme Court Of The United States

CINCINNATI SMSA LIMITED PARTNERSHIP,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In its petition, Cincinnati SMSA ("SMSA") asks this Court to review a purely historical question—namely, whether Ohio ever had the authority to enforce certain now-defunct Ohio regulations directed toward commercial mobile radio service ("CMRS") providers. In doing so, however, SMSA mentions only in passing the two key reasons why such review is unwarranted. First, the case is moot. While the Public Utilities Commission of Ohio ("PUCO") order that SMSA seeks to challenge here did originally expose it to potential liability, SMSA admits it has voluntarily settled the only damages action that could be brought based on that order. *See* Pet. at 15, 28. And because, as SMSA further admits, the PUCO expressly declined to impose either a fine or any injunctive relief, *see* Pet. at 14, the PUCO order places SMSA under no ongoing disability. Accordingly, a decision from this Court would have no impact on SMSA in this case, and the case is thus moot.

Second, even were that not so, in December 1999 the PUCO issued an order *specifically exempting CMRS providers (such as SMSA) from either of the regulatory requirements that SMSA seeks to challenge as preempted here*. In short, there is no live controversy between these parties. Rather, Petitioner seeks an advisory opinion from this Court regarding the scope of preemption under the Communications Act of 1934. While this may present an interesting hypothetical question, this Court has long recognized that "[u]nder Article III of the Constitution this Court may only adjudicate actual, ongoing controversies ..." *Honig v. Doe*, 484 U.S. 305, 317 (1988) (citation omitted); *Preiser v. Newkirk*, 422 U.S. 395, 401-03 (1975). This case simply does not qualify.

Review is unwarranted for another reason as well. The Federal Communications Commission ("FCC")—the federal agency charged with administering the regulatory

regime for CMRS providers—has yet to address whether 47 U.S.C. § 332(c)(3)(A) preempts regulations like the now-defunct Ohio regulations challenged here. That is, § 332(c)(3)(A) preempts only state law "rate regulation" and "market entry regulation." But the FCC has yet to consider whether these ambiguous terms encompass either discriminatory-rate claims (*i.e.*, rules requiring CMRS providers to charge the same rate to both affiliated and unaffiliated resellers) or structural-separation requirements (*i.e.*, regulations requiring a CMRS provider to separate its retail and wholesale businesses) like those the now-defunct Ohio regulations at one time imposed below. In SMSA's own words, the FCC "has not finished drawing the line between preempted rate regulation and 'other terms and conditions' of CMRS." *See* Pet. at 24. Accordingly, as a jurisprudential matter, this Court should defer consideration of the questions presented here until the FCC—the agency to whom Congress has entrusted implementation of the statutory scheme at issue here—has acted. This approach is particularly appropriate where, as here, no party will be harmed by delay. As noted above, SMSA has settled the only claim against it that could result from the PUCO order below, and the PUCO ended enforcement of the regulatory requirements on a going-forward basis.

Finally, even if the Court were not inclined to provide the FCC the first opportunity to interpret this statutory language, two additional reasons also support denial of certiorari here. First, this is a case of first impression. The alleged split in authority on which SMSA relies simply does not exist. The cases that SMSA cites considered state regulations far different from those presented here. Accordingly, the Court should await further development in the lower courts before accepting review. Second, review is unnecessary here because the court below got it right. The FCC has indicated that it is unwilling to read "rate regulation" as broadly as SMSA urges here for preemption

purposes under § 332, and the Ohio regulations at issue here fall comfortably outside the preemptive scope of § 332 thus understood. Thus, whether viewed from the standpoint of jurisdiction, jurisprudence, or the merits, this case provides a particularly poor vehicle for addressing the questions Petitioner presents.

STATEMENT OF THE CASE

I. Ohio Was On The Vanguard Of CMRS Deregulation.

In 1985, the Public Utilities Commission of Ohio ("PUCO") was among the first of the state regulatory agencies to begin deregulating cellular telephone service providers—part of the broader category now known under federal law as commercial mobile radio service or "CMRS." *See In the Matter of the PUCO Investigation Into the Regulatory Framework for Telecommunications Services in Ohio*, No. 84-944-TP-COI, 66 P.U.R. 4th 572, 1985 Ohio P.U.C. Lexis 44 (Apr. 9, 1985), at *28-*30. In 1993, Congress also got into the act, amending 47 U.S.C. § 332(c) to preempt States' authority "to regulate the entry of or the rates charged by CMRS providers." In doing so, however, it expressly preserved the States' ability to regulate "other terms and conditions" of CMRS. 47 U.S.C. § 332(c)(3)(A) ("§ 332").

In October 1993, the PUCO de-tariffed CMRS provider rates, thereby allowing the market to set those rates in Ohio. *In the Matter of the Commission Investigation Into the Implementation of Sections 4927.01 to 4927.05, Revised Code as They Relate to Competitive Telecommunications Services*, No. 89-563-TP-COI, 1993 Ohio PUC Lexis 1161 (October 22, 1993), at *48-*51. The PUCO, however, retained its authority to hear complaints under R.C. § 4905.26 regarding unreasonable or unlawful activity. *Id.*

The following year, in 1994, the FCC implemented § 332 and de-tariffed most CMRS services (including cellular). *In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, Second Report and Order (March 7, 1994) at ¶¶ 175, 179. Much like the PUCO had, the FCC expressly retained its jurisdiction over complaints alleging anti-competitive activity. *Id.* at ¶ 176.

In 1999, the PUCO further deregulated the CMRS industry in Ohio. In particular, the PUCO stated that it would no longer enforce either the prohibition on unreasonably discriminatory rates or the separation requirement in the CMRS industry, the very requirements about which SMSA complains here.[1] *See In the Matter of the Commission Investigation Into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC Lexis 745 (December 16, 1999) ("*December 1999 Order*") at *39-*45.

II. The PUCO Adjudication Of Westside Cellular's Complaint.

In 1993, Westside Cellular, Inc. d/b/a Cellnet ("Cellnet") filed a complaint before the PUCO against numerous wholesale cellular providers in Ohio (including SMSA). *See In the Matter of the Complaint of Westside Cellular, Inc. d//b/a Cellnet*, No. 93-1758-RC-CSS, 2001 Ohio PUC Lexis 18 (Jan. 18, 2001), Pet. App. at 4a-176a. Cellnet alleged several violations of Ohio's regulatory scheme, which purportedly resulted in monetary damage to Cellnet. It is that complaint that began the action in which SMSA is seeking review here.

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[1] The order is further detailed in Section III below.

Under Ohio law, the PUCO had exclusive jurisdiction over Cellnet's complaint, and a finding of a violation by the PUCO was a necessary predicate to a potential later court action by Cellnet seeking treble damages. *See* Ohio Revised Code ("Ohio R.C.") § 4905.61; *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 152, 573 N.E.2d 655 (1991) (affirming PUCO's exclusive jurisdiction over matters related to utility rates or service, and allowing a treble damages action under Ohio R.C. 4905.61 to proceed only upon the PUCO's finding of a violation).

Cellnet's complaint before the PUCO alleged, among other claims, that SMSA (and the other CMRS providers) violated Ohio law by (1) discriminating against Cellnet with regard to the wholesale terms and conditions of service when compared to the terms and conditions offered to SMSA's own retail affiliates, and (2) refusing Cellnet's request to "make capacity available on a wholesale basis" at the same rates SMSA charged to SMSA's own affiliated retail business (together, the "discriminatory rate claim"). *See* Pet. App. at 11a. Cellnet further alleged that SMSA (and the other providers) failed to maintain separate operations and records for its wholesale and retail business as required by Ohio law (the "separation requirement"). Pet. App. at 10a.

Recognizing the possibility that the case raised preemption concerns, in 1994 the PUCO sought a ruling on the scope of its authority pursuant to § 332(c) from the agency best suited to resolve the issue: the FCC. In requesting FCC guidance, the PUCO expressly disclosed the nature of the allegations that Cellnet was advancing before it. *See, e.g., In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service, Order on Reconsideration* (*"FCC Ohio Order on Reconsideration"*), 10 F.C.C.Rcd. 12427 (August 3, 1995), at 12433-12439 (discussing matters related to Cellnet complaint). And some of the respondents to Cellnet's

complaint proceeding also filed papers with the FCC further elaborating on the nature of the case. *See FCC Ohio Order on Reconsideration*, 10 F.C.C.Rcd. 12427, 12428, n.4.

The FCC, however, declined to prevent the PUCO from moving forward. It noted as a preliminary matter in its initial Ohio order that: "Unlike some of the opponents of the [PUCO] Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and federal regulation of CMRS entirely, it could have done so easily." *In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service* ("*FCC Ohio Order*"), 10 F.C.C.Rcd. 7842 (May 4, 1995), at 7844. The FCC further explained that Ohio retained regulatory authority over the "other terms and conditions" of CMRS arrangements:

> Ohio states that it presently exercises jurisdiction over cellular service providers and radio common carriers to ensure that wholesale cellular rates are not below cost through its complaint authority . . . *[A]lthough Ohio may not prescribe, set, or fix rates* in the future because it has lost authority to regulate "the rates charged" for CMRS rates, *it does not follow that its complaint authority under State law is entirely circumscribed.* Complaint proceedings may concern carrier practices, separate and apart from their rates . . . [Ohio can also continue to regulate "other terms and conditions" of CMRS, including customer billing information and practices, billing disputes, and contractual arrangements between CMRS providers] . . . to the extent that such review does not *directly affect* end-user rates.

FCC Ohio Order, 10 F.C.C.Rcd. at 7852-53, at ¶¶ 43-44 (emphasis added). The decision thus recognized: (1) that notwithstanding § 332's preemption provision, Ohio had complaint authority over cellular providers; (2) that the FCC defines "rate regulation" narrowly to include only regulation *directly* affecting *end-user* rates; and (3) that the FCC confirmed that the PUCO generally continued to retain complaint authority over CMRS providers. The FCC, in its Ohio ruling, also declined to opine definitively on the record before it on the "demarcation between preempted rate regulation and retained state authority over terms and conditions" of CMRS. *FCC Ohio Order*, 10 F.C.C.Rcd. at 7852, at ¶ 42.

In 1995, just days before the FCC issued its order, one of the respondents named in the Cellnet complaint sued the PUCO in federal district court seeking to enjoin the PUCO from adjudicating Cellnet's complaint. The plaintiff based its claim for injunctive relief on the grounds that federal law preempted the PUCO from acting on the Cellnet complaint. The district court granted a preliminary injunction, but the Sixth Circuit reversed thereby allowing the PUCO to proceed. *See GTE Mobilnet of Ohio, et al. v. Johnson, et al.*, 111 F.3d 469 (6th Cir. 1997).

After extensive discovery, the PUCO conducted hearings on Cellnet's complaint from January 1999 through March 1999. During these hearings, the PUCO expressly restricted its consideration to claims regarding conduct by SMSA and the other named providers that occurred between 1993-98. Pet. App. at 10a.

In January 2001, the PUCO ruled on the merits of Cellnet's claims. The PUCO found that between 1995 and 1998 SMSA engaged in discriminatory conduct, did not maintain separate accounting records for retail and wholesale functions as required by state law, and from 1993-95 did not

comply with prior PUCO orders regarding separation of accounting and operational functions for SMSA's affiliated retail and wholesale businesses. *In the Matter of the Complaint of Westside Cellular, Inc. d/b/a Cellnet*, No. 93-1758-RC-CSS, 2001 Ohio PUC Lexis 18 (Jan. 18, 2001), Pet. App. at 175a (paragraphs numbered (6), (7), and (8)).[2] The PUCO found that SMSA's (called "Ameritech Mobile" in the PUCO order) conduct violated its prior orders and violated Ohio R.C. § 4905.33 (discriminatory rates), Ohio R.C. § 4905.35 (undue preference), and Ohio R.C. § 4905.54 (violation of PUCO orders), and Ohio R.C. § 4905.22 insofar as SMSA failed to make its wholesale capacity available to Cellnet. Pet. App. at 175a; *see also* Pet. App. at 169a, 147a-149a, 89a-95a, and 66a-73a.

Because the PUCO had issued an order in 1999 prospectively exempting CMRS providers from the regulatory requirements that it concluded SMSA and the others had violated (see discussion in Section III below), the PUCO neither imposed a fine, nor any form of injunctive relief. Rather, the PUCO expressly stated that it was merely making a retrospective finding regarding the legality of the respondents' conduct during the 1993-98 period. In the PUCO's own words: "The Commission specifically calls attention to the fact that any determination to be issued in this case is retrospective in nature. In its Finding and Order of December 16, 1999, the Commission instituted the new regulatory scheme under which commercial mobile radio service providers are to operate." Pet. App. at 60a. *See also* Pet. App. at 171a (". . . Since this is a case of first impression

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[2] In a separate appeal, the Ohio Supreme Court reversed the PUCO's determinations that most of SMSA's violations of law were limited to 1995-98, and held that the violations of law that the PUCO had found in the *Cellnet* case encompassed the time period of 1993-98. *See Westside Cellular, Inc., v. Public Utilities Comm. of Ohio*, 98 Ohio St. 3d 165, 781 N.E.2d 199 (Dec. 26, 2002).

relative to the Commission's ability to hear complaint cases involving allegations of discrimination with respect to commercial mobile radio service providers, the Commission concludes that, in this particular case it will not assess any fines pursuant to § 4905.54, Revised Code.").[3]

The same day that the PUCO rendered its decision, Cellnet sued SMSA in an Ohio trial court (the "damages action"), based on the PUCO order. It filed its action under Ohio R.C. § 4905.61, which allows for recovery of treble damages caused by a utility company's violation of statutes or regulatory orders. Under Ohio law, for purposes of the damages action, the PUCO determination was dispositive on the question of liability. The only question to be litigated, as the trial court recognized, was the amount of damages. *Westside Cellular, Inc., d/b/a Cellnet v. New Par, et al.*, Case No. 428050 Opinion (March 21, 2003), Pet. App. at 193a-194a.

While the damages action was pending in trial court, SMSA exercised its right to challenge the PUCO liability determination through direct review of the PUCO order in the Ohio Supreme Court (the "liability appeal"). *See* Ohio R.C. §§ 4903.11, 4903.12, and 4903.13. Because the damages action was premised solely on the PUCO's liability determination, and because SMSA was challenging that finding before the Ohio Supreme Court in the liability appeal, SMSA also asked the Ohio Supreme Court to stay trial court consideration of the damages action. The Court granted the

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[3] While the PUCO also states in its order in this case that it was "not creating a defense to potential future claims under §§ 4905.33 and 4905.35, Revised Code," Pet. App. at 171a, in the context of its 1999 deregulation order eliminating the requirements as to CMRS providers that were the basis of Cellnet's complaint, the likelihood that another similar complaint might be brought against SMSA with regard to conduct occurring before the 1999 deregulation order is remote.

stay, thereby holding the damages action in abeyance pending the outcome of the liability appeal. *Cincinnati SMSA v. Pub. Util. Comm.*, (Entry) (Nov. 19, 2002), Appendix to Respondent's Brief ("PUCO App.") at A-2.

On December 30, 2002, the Ohio Supreme Court decided the liability appeal, unanimously affirming the PUCO's finding that SMSA had violated Ohio law, and rejecting SMSA's federal preemption claim. *Cincinnati SMSA v. Pub. Util. Comm. of Ohio*, 98 Ohio St.3d 282, 781 N.E.2d 1012 (2002), Pet. App. at 1a-3a; *see also New Par v. Pub. Util. Comm. of Ohio*, 98 Ohio St. 3d 277, 781 N.E.2d 1008 (2002), Pet. App. at 178a-184a. It is this Ohio Supreme Court decision that SMSA asks this Court to review.

Because the liability appeal was over, the judge in the damages action issued a pre-trial ruling on a pending motion to limit the scope of damages at trial. *Westside Cellular v. New Par,* Opinion (March 21, 2003), Pet. App. at 185a-195a. Shortly thereafter, SMSA and Cellnet settled Cellnet's damages claims in their entirety.[4] Accordingly, Cellnet dismissed its case against SMSA with prejudice. *Westside Cellular v. New Par,* Journal Entry (April 2, 2003), PUCO App. at A-1. Thereafter, SMSA filed this petition for writ of certiorari.

III. In 1999, The PUCO Exempted CMRS Providers From The Regulatory Requirements That SMSA Complains Of Here.

In 1999, while the Cellnet complaint was pending before the PUCO, the PUCO decided (in a separate and unrelated proceeding) to further deregulate the CMRS

[4] The PUCO was not a party to that settlement, and accordingly is not certain of its precise terms.

industry in Ohio. *See December 1999 Order* at *39-*45.[5] In its order, the PUCO found that because of changes in the telecommunications industry that promoted competition, the PUCO "no longer need[ed] to maintain the current level of regulatory oversight of CMRS." *Id.* at *39. Accordingly, the PUCO chose to "grant CMRS an exemption from a number of existing Commission requirements." *Id.* at *39-*40. Of particular importance to this case, the PUCO expressly stated that it was exempting the CMRS industry from both of the requirements of which SMSA complains here. First, the PUCO expressly eliminated the separation requirement (*i.e.*, the rule requiring CMRS providers to maintain separate wholesale and retail operations). In the PUCO's own words: "The Commission finds that it is no longer necessary to require that CMRS providers continue to maintain structurally separate wholesale and resale operations." *Id.* at *40-*41. Second, the PUCO determined that it would no longer entertain discriminatory wholesale rate complaints from CMRS resellers (such as the type of complaint Cellnet brought against SMSA here). *See id.* at *42 (the PUCO "no longer believes that it is necessary to apply Section[] 4905.26 [*i.e.*, PUCO's complaint authority] . . . to the CMRS wholesale market"). The PUCO's 1999 deregulation order means that CMRS providers no longer face the regulatory strictures that form the basis for the petition here.

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[5] In doing so, the PUCO acted pursuant to Ohio R.C. § 4927.03, which permits the PUCO to exempt, by order, any telephone company or companies (*i.e.*, including cellular providers) as to any public telecommunications service except basic local exchange service, from any provision of Chapter 4905 or 4909 of the Revised Code or any rule or order issued by PUCO under those chapters.

REASONS FOR DENYING THE PETITION

I. This Case Is Moot In Light Of SMSA's Decision To Settle The Damages Claim Against It, And The PUCO's Decision Not To Impose Fines Or Prospective Relief Against SMSA.

A fundamental tenet of federal jurisdiction is that an actual controversy must exist at all stages of judicial review. *Golden v. Zwickler*, 394 U.S. 103 (1969); *Preiser v. Newkirk*, 422 U.S. 395, 401-03 (1975); *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972). Federal court jurisdiction is limited to resolving "real and substantial" controversies as distinguished from issuing opinions advising parties on academic questions of law. *Preiser v. Newkirk*, 422 U.S. at 401. Here, however, SMSA has settled the only claim for money damages that could result from PUCO's liability determination, and the PUCO expressly elected not to impose either fines or injunctive relief. Accordingly, all that is left of this case are SMSA's academic questions about the extent of preemption under § 332 and its concerns about the possible precedential effect of the Ohio Supreme Court decision. Neither of these, however, provides any basis for jurisdiction here.

A. Cellnet And SMSA Settled Their Dispute.

The purpose of Cellnet's complaint before the PUCO was to establish liability in order to pursue a treble damages action under Ohio R.C. § 4905.61. Under Ohio law, any such action for damages must be preceded by, and is entirely contingent upon, a liability determination by the PUCO. *See* Ohio R.C. § 4905.61. *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 152, 573 N.E.2d 655 (1991) (treble damages action under Ohio R.C. § 4905.61 first requires PUCO liability determination); *accord, State ex rel. Dayton Power & Light Co. v. Kistler*, 57 Ohio St.2d 21, 385

N.E.2d 1076 (1979). Thus, Cellnet's damages action against SMSA in 2001 was premised entirely upon the PUCO's finding of liability. And, conversely, the purpose underlying SMSA's appeal to the Ohio Supreme Court of that PUCO liability determination was to avoid those damages.

As SMSA admits, however, *see* Pet. at 15, 28, in April 2003 the parties settled that damages case. And this Court has repeatedly recognized that settlements of an underlying action render a case moot. *See generally U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) (discussing effect of mootness by reason of settlement); *cf. Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 192 (2000) (no federal court jurisdiction over cases in which one or both parties plainly lacks a continuing interest, "as when the parties have settled..."); *Buck's Stove & Range Co. v. American Federation of Labor*, 219 U.S. 581 (1911) (dismissing appeal where oral argument revealed that settlement mooted case). Accordingly, SMSA cannot rely on its now-extinguished exposure to potential damages to establish jurisdiction here.

B. The PUCO Imposed No Fines Or Injunctive Relief Against SMSA.

Under statute, the PUCO could have imposed other sanctions—either fines (forfeitures) or injunctive relief—against SMSA for SMSA's violations of Ohio law. *See* Ohio R.C. §§ 4905.54; 4905.381. And if the PUCO had done so, this case may not be moot. But the record plainly shows that the PUCO chose *not* to impose any such sanction against SMSA. *See In the Matter of the Complaint of Westside-Cellular, Inc. d/b/a Cellnet*, (Ohio P.U.C. 2001), Pet. App. at 171a, 175a. Accordingly, nothing in this case turns on this Court's resolution of the appeal, and it is therefore moot. *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (case was

moot where plaintiff, who challenged law school's admission policy, was admitted to law school and would complete his legal studies regardless of any court decision).

Further underscoring the mootness here, the PUCO has eliminated the regulatory requirements of which SMSA complains. In December 1999, the PUCO amended its regulations to eliminate (1) its complaint authority to review discriminatory rate claims against CMRS providers such as the one at issue here, and (2) the requirement that CMRS providers maintain separate operations and accounting for their wholesale and retail business (*i.e.*, the separation requirement). *See December 1999 order* at *40-*45, ¶¶ 2, 3 and 4. Since these provisions have already been eliminated, this Court need not consider whether it should strike them down as preempted.

Moreover, because the PUCO does not intend to revive these regulations, SMSA cannot squeeze this now-moot case into the "capable of repetition, yet evading review" exception to the mootness doctrine. *Cf. DeFunis*, 416 U.S. at 319 (challenge to law school admissions policy was not "capable of repetition" as to law student who was about to graduate from the school); *see also Friends of the Earth, Inc.*, 528 U.S. at 192 (even if case has been litigated for years, mootness prevents continuation where one or both parties plainly lacks a continuing interest, "as when the parties have settled..."); *Diffenderfer v. Central Baptist Church, Inc.*, 404 U.S. 412, 414-15 (1972) (case moot where statute challenged as unconstitutional had been repealed). At bottom, whatever decision this Court may reach on the merits, SMSA faces neither fines, nor injunctions nor damages. Thus, review is not warranted here.

C. SMSA's Hypothetical Concern About Precedential Effects Is Not Enough To Overcome Mootness.

All that is really left is SMSA's concern about the possible precedential effect of the Ohio Supreme Court's decision in other cases, especially cases in other states. *See* Pet. at 29. That fear about what may happen in *other* cases, however, is insufficient to avoid mootness in *this* case. *Cf. Lane v. Williams*, 455 U.S. 624, 634 (1982) ("the possibility that other persons may litigate a similar claim does not save this case from mootness"); *American Family Life Insurance of Columbus v. Federal Communications Commission*, 129 F.3d 625, 629-30 (D.C. Cir. 1997), *citing Radiofone, Inc. v. FCC*, 759 F.2d 936, 939 (D.C. Cir. 1985) (possible precedential effect of case not enough to avoid mootness); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 589 (1961) (agreeing that if threat of prosecution under arguably superseded state statute arose, and if a state court decided that the statute was still applicable, "that would be time enough to consider that statute's validity").

In short, SMSA cannot simultaneously settle the damages case—the only sanction it faced as a result of the PUCO order—yet continue to litigate the liability determination based on its concern about the potential future effect of the decision below. Denial of certiorari here is thus merely an application of the principle that a "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *U. S. Bancorp*, 513 U.S. at 25. SMSA chose to settle the only damages action that could be brought based on the PUCO order. *Cf. id.* ("[i]n these respects the case stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all."); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 72 (1997) (non-class-action challenge to state constitutional amendment mandating use of English in the

workplace became moot when plaintiff, who sought to use her bilingual skills in the workplace, left state employment). Consequently, this case is moot, and there is no reason to grant certiorari here.

II. Review Is Not Warranted Here Because The PUCO Has Eliminated The CMRS Regulatory Requirements Of Which SMSA Complains.

Aside from the (now-moot) issues presented in the proceeding below, SMSA posits concerns about potential future problems in other cases if the decision below were followed. *See, e.g.*, Pet. at 2, 29 (claiming that if other states did as the Ohio court did here, "regulatory chaos" would ensue). But those concerns do not warrant review here. The PUCO's December 1999 Order eliminated the regulatory requirements SMSA dislikes, and, if another State follows the Ohio Supreme Court's preemption analysis in examining *other* laws in *other* cases, then the parties in those cases may appeal. That does not change the fact that this case, and these regulatory requirements, are history, and thus there is no reason for this Court to waste its limited resources by accepting review.

As discussed above, the PUCO's decision, although it found that SMSA's conduct violated then-existing Ohio law, imposed no prospective sanctions on SMSA. And, because PUCO's December 1999 Order eliminated any application of the challenged regulatory requirements here to future conduct by CMRS providers, SMSA (or any other CMRS provider in Ohio) will not be subject to sanctions by the PUCO for similar conduct in the future. As of 2000, the PUCO will no longer hear complaints against CMRS providers that are based on claims of alleged discrimination in wholesale rates, and it has dropped the separation requirement. *December 1999 Order* at *39-*45. And, because PUCO will not hear such complaints, private parties cannot pursue any such

claims in court. *See* Ohio R.C. § 4905.61; *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St.3d at 152. Thus, the regulatory conflict and confusion that SMSA speculates may occur in future cases is certainly not going to occur in Ohio. The party here, the PUCO, is officially out of the business of monitoring allegedly discriminatory wholesale rates.

The PUCO's December 1999 Order changing Ohio's CMRS regulatory landscape similarly undercuts SMSA's extra-territoriality argument. *See* Pet. at 16. SMSA asserts that because of the nature of cellular phone transmission (*i.e.*, by radio wave to the closest cellular tower), the imposition of regulatory authority in Ohio can have direct effects in neighboring States (since cellular phones in those States may use Ohio towers and vice-versa). But, as noted above, the PUCO has ended enforcement of these regulations against CMRS providers in Ohio, and thus SMSA's fears of extra-territorial regulatory creep beyond Ohio's borders cannot materialize.

SMSA's concerns about potential claims by other cellular resellers against SMSA (or other cellular carriers) for pre-1999 conduct, *see* Pet. at 28, are similarly misplaced. During the six years the *Cellnet* case was pending before the PUCO below, no other cellular reseller sought to join as a plaintiff. If nobody joined then, the odds are slim that a new plaintiff will show up now. The remote possibility that some as yet unidentified party might conceivably make such a claim at some unspecified future time does not make review necessary (or appropriate) here.

In short, the specter SMSA raises of a complaint being filed against it in Ohio is not only hypothetical, but also remote. This Court should not accept review merely to pre-decide the outcome of such far-fetched contingencies.

III. SMSA Has Failed To Identify A Well-Developed Split Among The Lower Courts—The Cases SMSA Cites Do Not Consider The Same Issue As That Presented In The Ohio Case Below.

SMSA premises its request for review upon a supposed conflict between the Ohio decision below and other courts regarding the scope of preemption under § 332. *See, e.g.*, Pet. at 2, 16-17, 21, 24, 28-30. Indeed, SMSA states that "the Ohio Supreme Court is the only court ever to have upheld state power to regulate CMRS on the matters at issue in this case." Pet. at 17, 24. What SMSA fails to acknowledge, though, is that the Ohio Supreme Court is also the only court ever to have *considered* these matters. While state and federal courts have considered preemption claims under § 332 with regard to *other* state law claims, only the decision below addresses whether a state law claim *for discriminatory conduct* by a CMRS provider is preempted by § 332. Consequently, as to that issue, the Ohio decision is one of first impression, and this Court should thus await further development in the lower courts before accepting review.

SMSA's petition asks whether the now-inapplicable provisions of Ohio law that SMSA was found to have violated are preempted under 47 U.S.C. § 332(c)(3)(A) as regulation of rates or market entry of CMRS providers. That statute provides in relevant part: "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating other terms and conditions of commercial mobile service . . . ."

In deciding whether a federal law preempts a state statute, the Court looks to the text and structure of the federal statute in question. If the statute contains an express

preemption clause, and the one here does, statutory construction focuses first on the plain wording of the clause, which contains the best evidence of Congress's preemptive intent. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), *citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). In its petition, SMSA cites a number of cases that have considered the text in § 332, as well as cases determining preemption under different statutory language. Those cases, however, are inapposite in the face of the state-law rate-discrimination claim presented here, and thus they do not provide the conflict that SMSA seeks to establish here.

SMSA relies heavily upon *Texas & Pac. Ry. Co. v. Abilene Cotton Oil*, 204 U.S. 426 (1907), and its progeny, *see* Pet. at 19-21, in claiming a conflict regarding the scope of preemption under § 332, but that reliance is misplaced. SMSA uses these cases to argue that other courts have held that state-law rate-discrimination claims constitute rate regulation for federal preemption purposes. To be sure, in *Abilene Cotton*, the Court held a state law unreasonable rate discrimination claim to be preempted by federal law—there a law that required carriers to file their rates in tariff form with the Interstate Commerce Commission and, once the ICC approved those rates, to uniformly charge them to all customers. *Abilene Cotton*, 204 U.S. at 439.

But the principle originating in the *Abilene Cotton* case is explicitly based on the existence of filed tariffs "as an effective means for redressing the wrongs resulting from unjust discrimination." *Id.; see also AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) (applying filed rate doctrine); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 301-02 (1988) (Michigan law impacting natural gas rates preempted by FERC requirement for filed tariffs); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (filed rate doctrine prohibited award of damages for breach of contract during

time when utility was subject to FERC's jurisdiction). Where (as here) no tariff requirement applies and the federal agency does not prescribe the rates to be charged, the *Abilene Cotton* principle does not apply. Indeed, the FCC itself has recognized that the "filed rate doctrine" that emerged from these cases provides no guidance in assessing whether a given state law providing for monetary damages is preempted as "rate regulation" under § 332, or is instead an "other term or condition" of CMRS as to which states retain authority under that section. *See In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C.Rcd. 17021 (2000), at ¶¶ 19, 21. *See also* Section IV, below.

The federal appellate court cases SMSA cites, *see* Pet. at 24-25, also fail to support its claim that a "conflict" with the decision below exists. Both *G&T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3rd Cir. 1987), and *Alliance Shippers, Inc. v. Southern Pacific Transportation Co.*, 858 F.2d 567 (9th Cir. 1987), involve preemption of discriminatory rate claims under federal statutes deregulating railroads. There, though, the legislative history of the federal statute, upon which the courts expressly relied, stated that "[n]o state law or federal or state common law remedies are available." *See G&T Terminal*, 830 F.2d at 1234 (citation omitted). Neither § 332(c)(3)(A), nor, for that matter, its legislative history, *cf. H.R. Report No. 103-111* (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588, however, contains such a broad, all-encompassing statement of preemption of state law. Accordingly, these cases do not conflict with the case below, which considered preemption under a different, and narrower, provision.

The other federal and state cases cited by SMSA to support its claim of a "conflict" with the decision below do not even address the issue of whether discriminatory conduct claims are preempted by § 332. *See* Pet. at 21-24. For example, in *Tenore v. AT&T Wireless Servs.*, 962 P.2d 104

(Wash. 1998), the court determined that plaintiffs' state law *false advertising* claims concerning carrier rates were *not* preempted by § 332.[6] False advertising claims are, of course, far different from the discriminatory conduct claim presented below, so whatever the merits of the Washington court decision, it does not create a conflict with the Ohio decision below.

Another case on which SMSA relies, *Digital Communications Network, Inc. v. AT&T Wireless Serv.*, 63 F.Supp.2d 1194 (C.D. Cal. 1999), *see* Pet. at 22, similarly fails to create any meaningful conflict. There, the plaintiff made an "unreasonable rate" claim predicated on 47 U.S.C. §§ 201 and 202, *i.e.*, on *federal* law. The principal question facing the court was whether the court should resolve this federal law claim itself, or instead refer it to the FCC under the doctrine of "primary jurisdiction." 63 F. Supp.2d at 1196-97. While the court did, in passing, consider the preemptive scope of § 332 with regard to certain California regulations, *id.* at 1198-99, the question before the court was whether the federal court, or the FCC, should resolve the federal law claims. *Id.* at 1199. Moreover, to the extent the court even discussed the issue, the court relied almost entirely on the California PUC's own understanding of the reach of its regulatory authority. *Id.* at 1198-99. The California PUC's position, however, is not necessarily inconsistent with the Ohio Supreme Court ruling here. The California PUC merely concluded in its 1996 order that § 332 "prohibits this Commission from setting a particular numerical margin that must be provided to cellular resellers." *Id.* at 1198. Of

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[6] The FCC's determination that § 332 preempts State authority to prohibit CMRS providers from charging for incoming calls or charging in whole-minute increments, *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.Rcd. 19898 (1999), at ¶ 23, *see* Pet. at 24, also did not address the issue of discriminatory conduct claims such as the one under the former Ohio law at issue here.

course, Ohio's former requirement, that wholesale rates not be unreasonably discriminatory, is a far cry from a regulation that directly establishes a "particular numerical margin."

SMSA additionally argues, *see* Pet. at 26-28, that the PUCO's former rule requiring CMRS providers to separate their wholesale and retail operations constitutes preempted "market entry" regulation under § 332. Ironically, the PUCO imposed its separate wholesale/retail accounting requirements for the express purpose of facilitating non-discriminatory competition and promoting ease of market entry.[7] *See* App. at 67a (PUCO's separate accounting requirement was "intended to permit a subsequent review of transactions between the underlying wholesale carrier and its affiliated reseller for the purpose of ascertaining whether 'the affiliated reseller received access to any cellular services, or any component bundled therewith, at prices and/or terms and conditions different from those available to nonaffiliated resellers'"). But, in any event, the regulation itself, which merely imposed a formal structural separation requirement, is far different from the state law claim at issue in *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983 (7th Cir. 2000), the case on which SMSA principally relies to create a "conflict." *See* Pet. at 27. There, the plaintiff's state law claim contended that the CMRS provider should have built more cellular

[7] The PUCO's passing comment in its December 1999 order to the effect that PUCO was eliminating the requirement that CMRS providers maintain separate wholesale and retail operations "in order to ensure that no company will be restricted from entering the Ohio market as a result of a mandated structural organization," *December 1999 order* at *41, does not serve to transform that now-eliminated requirement into a market entry regulation.

towers, a far more intrusive, and expensive, regulation than that at issue here. Accordingly, *Bastien* does not create any conflict justifying a grant of certiorari here.[8]

IV. Review Is Unwarranted For The Additional Reason That Judicial Review Of The Scope Of Preemption Under § 332 Is Premature.

Not only has the specific preemption issue presented in this case not been addressed by other federal courts of appeal or state courts of last resort, but the FCC, the agency charged with administering the regulatory regime for CMRS providers, has yet to offer its opinion on the scope of "rate" or "market entry" regulation under § 332. Furthermore, SMSA has an avenue available to it if it desires guidance from the FCC on this issue. The FCC is authorized to issue a declaratory ruling "terminating a controversy or removing uncertainty." 47 CFR § 1.2. An FCC interpretation of the meaning of "regulate the entry of or the rates charged" in 47 U.S.C. § 332(c)(3)(A) would allow the FCC to bring its considerable expertise on CMRS matters to bear on the important question of the appropriate scope of preemption. Especially in light of the fact that nothing would turn on the

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[8] Further, any suggestion by SMSA, *see* Pet. at 27-28, that the FCC's failure to impose a similar separation requirement impliedly preempted the former Ohio requirement misses the mark. One of the FCC orders on which SMSA relies for its implied preemption argument itself refers to a then-existing California PUC separation requirement. *See* FCC *Resale NPRM*, 6 F.C.C.Rcd. 1719 (1991), at ¶ 28, n.35. In light of the FCC's reference to an apparently similar wholesale/retail separation requirement, there is no reason to suppose that the FCC "impliedly preempted" such regulation. In any event, the PUCO's elimination of its separation requirement, *December 1999 Order* at *40-*42, ¶¶ 2 and 3, makes review of this issue unnecessary in this case.

Court's decision here, as a jurisprudential matter the Court should decline review, thereby giving the FCC the first shot at interpretation.

This Court has long recognized the usefulness of a federal administrative agency's interpretation of a statutory or regulatory provision that the agency is charged with administering. To that end, the courts may invoke the "primary jurisdiction" doctrine to permit the parties to seek an administrative ruling on a matter within the agency's area of expertise that may affect the determination of the legal issue pending in court. *See generally United States v. Western Pacific Ry. Co.*, 352 U.S. 59 (1956). Additionally, when Congress has not expressed its intention with regard to a question (that is, when a statute administered by an administrative agency is ambiguous), the court generally will defer to the agency's interpretation of the provision if that interpretation is reasonable. *See generally Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The issue of preemption here turns on whether the discriminatory conduct claims litigated in the case below under former Ohio law were preempted by 47 U.S.C. § 332 as "rate regulation" (or "market entry" regulation), and the FCC has not addressed the meaning or scope of either of these terms in this context. Thus, the Court should decline to review these issues until the FCC weighs in. This approach makes sense as a jurisprudential matter, and is consistent with principles of primary jurisdiction and deference to agency determinations recognized in this Court's cases.

Declining review of this case is particularly appropriate where, as here, an FCC decision regarding the scope of preemption under § 332 in another factual context indicates that the agency is reluctant to read "rate regulation" in § 332(c)(3)(A) as broadly as SMSA urges here. Contrary to SMSA's implication in its petition (at 18-21), the "filed rate" doctrine, *see, e.g., Arkansas Louisiana Gas Co. v. Hall*,

453 U.S. 571 (1981), cited at Petition at 20, does not apply to preemption analysis in the now-deregulated CMRS industry. The FCC recognized as much in 2000. It rejected the argument that the analysis under the "filed rate" cases—in which courts have found that calculating and awarding damages is tantamount to rate regulation—should apply in cases addressing whether state law claims are preempted under § 332. *See In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C. Rcd. 17021 (2000), at ¶¶ 19 and 21 (noting that the distinction between "rate regulation" on the one hand, and "other terms and conditions" of CMRS subject to state jurisdiction, on the other hand, is not part of the logic or analysis of the filed rate doctrine).[9]

Moreover, the FCC's analysis in *Wireless Consumers Alliance* of the more limited scope of "rate regulation" preemption under § 332 is consistent with this Court's recognition that a statute limiting a state's authority to "regulate rates" is narrower in its preemptive effect than a statute that preempts state laws that "relate to" rates. *See Morales v. Trans World Airlines*, 504 U.S. 374, 385 (1992). In *Morales*, the Court considered a federal preemption challenge to a Texas air travel industry guideline that purported to require certain disclosures as to fare terms, restrictions and availability by air carriers. The federal statute at issue, the Airline Deregulation Act, prohibited States from enforcing any law "relating to" rates, routes, or services of any air carrier. Texas contended that the federal

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[9] Although FCC opined that the term "rates charged" in § 332(c)(3)(A) may include both rate levels and rate structures for CMRS, and that states are preempted from regulating either of these, *Southwestern Bell*, 14 F.C.C.Rcd. 19898 at ¶ 20, it did not discuss discriminatory conduct claims such as those at issue here under former Ohio law. *Cf. FCC Ohio Order*, 10 F.C.C.Rcd. 7842 (1995), at ¶ 43 (declining to rule that PUCO's then-existing complaint authority under Ohio R.C. § 4905.26 was preempted).

statute only preempted the States from actually prescribing rates, routes or services. This Court, however, concluded that such a construction "simply reads the words 'relating to' out of the statute." *Id.* at 385. According to the Court, "[h]ad the statute been designed to preempt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services.'" *Id.*, *citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987) ("A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate [a matter], a law . . . must be specifically then directed toward [it]."). Under *Morales*, then, the FCC reasonably could decide that state law discriminatory conduct claims such as those at issue here were not preempted by § 332 as "rate regulation" or "market entry" regulation.

Here, the PUCO's order was not specifically directed toward setting rates to be charged by CMRS providers, *cf. Morales*, 504 U.S. at 385, but simply at preventing discrimination between unaffiliated and affiliated cellular resellers. In other words, the PUCO did not even attempt to determine the "appropriate" rate to be charged by SMSA, but merely sought to ensure that SMSA offered the same rate, however set by SMSA, to unaffiliated resellers as it did to its own affiliated retail operation. Contrary to SMSA's assertion, *see* Pet. at 18, a discrimination claim such as the one at issue here does not involve determining "reasonableness," but rather only "sameness." As the Sixth Circuit stated when reversing a district court's injunction against the PUCO's consideration of the case below, "[u]nder Ohio law, it makes no difference if the rate charged is two cents a minute or twenty dollars a minute, as long as

affiliated resellers are charged the same rates as unaffiliated resellers." *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 477 (6th Cir. 1997).[10]

Had SMSA maintained some sort of accounting records that showed the rates it charged its affiliated retail arm, the proof in this case would have been a simple matter of comparison of the rates offered to SMSA's retail affiliates with those offered to Cellnet. But because SMSA had failed to implement the then-existing "separation requirement," it lacked such information. Accordingly, the PUCO applied an evidentiary presumption that, for purposes of comparing rates, SMSA's internal wholesale rate (*i.e.*, the rate it charged its affiliated retailers) was zero. *See, e.g.*, Pet. App. at 2a-3a (Ohio Supreme Court ruling); Pet. App. at 90a-91a (PUCO order, concluding that SMSA (called "Ameritech Mobile" in the order) failed to appropriately maintain records that would assist the PUCO in potentially ruling in its favor, and noting specifically that there was no evidence that Ameritech Mobile's retail affiliate purchased service at rates under the same terms and conditions as nonaffiliated resellers); Pet. App. at 92a (noting testimony of a Mr. Ferber, then regional general manager for SMSA, admitting that there was no rate between Ameritech Mobile's wholesale and retail affiliates, but if there were, it would be lower than that allowed under the pricing matrices presented at the hearing [*i.e.*, prices offered to unaffiliated resellers]); Pet. App. at 93a-95a. Application of this evidentiary presumption, however, is far

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[10] In concluding that the Ohio law at issue in the case below was not facially preempted by 47 U.S.C. § 332(c)(3)(A), the Sixth Circuit relied on *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298 (9th Cir. 1995) (holding that a federal statute expressly preempting state regulation of cable television rates did not prevent a cable television operator from bringing an action in state court alleging that a competitor was engaging in below-cost predatory pricing, reasoning that the California statute at issue did not regulate rates), *cert. dismissed*, 517 U.S. 1152 (1996).

different than "prescribing rates" for a CMRS provider. Consequently, the FCC, or this Court, could reasonably conclude that the PUCO's order in this case did not have the effect of "regulating" rates of a commercial mobile service provider contrary to 47 U.S.C. § 332(c)(3)(A).[11]

As the FCC recognized in *Wireless Consumers Alliance*, the "other terms and conditions" exception to preemption would be completely eliminated if one equates state action that may increase the cost of doing business with rate regulation. *See* 15 F.C.C.Rcd. 17021 at ¶ 34, *citing CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999); *cf.* 15 F.C.C.Rcd. 17021 at ¶ 36 (holding that the award of money damages in state contract or tort causes of action would generally fall under the "terms and conditions" exception to preemption in § 332). *Cf. In the Matter of Petition of Pittencrief Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 F.C.C. Rcd. 1735 (Sept. 25, 1997) at ¶ 18 (rejecting argument that the "other terms and conditions" exception to preemption in § 332 is limited to matters concerning consumer protection and the promotion of competition). If a state does not purport to determine the reasonableness of a prior rate or set a prospective charge for services, *cf.* 15 F.C.C.Rcd. 17021 at ¶ 39, § 332 does not necessarily preempt a damage award under state law.

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[11] Because SMSA settled the treble damages claim that Cellnet brought against it in the related court action, no calculation of damages ever took place. Not only would calculating a "reasonable rate" for SMSA have been unnecessary in the damages action, *cf. GTE Mobilnet*, 111 F.3d at 477-78, the settlement means that no damages of any kind were, or will be, calculated in connection with the liability determination below. SMSA's contention that "[t]he calculation of Cellnet's claim for damages was based on the PUCO's finding that SMSA's 'internal wholesale rate' was zero," Pet. at 15, accordingly is misleading.

Moreover, while SMSA correctly notes that the federal government has elected not to regulate through the use of filed tariffs, *see* Pet. at 5, that does not mean that all state law remedies that have any impact on rates charged for CMRS services are preempted. The FCC itself recognized this in rejecting a contention that all money damages awards based on state law tort and contract claims against CMRS providers were preempted by § 332 as rate regulation. 15 F.C.C. Rcd. 17021, at ¶ 36. In so ruling, the FCC agreed that enforcement of tort and contract laws through a monetary remedy is compatible with the federal statute's purpose of promoting the CMRS industry's reliance on a competitive market. *Id.* at ¶ 24.

For all of these reasons, the Court should decline to review the preemption issues in this case until the FCC has considered the scope of rate and market entry regulation under § 332 with respect to discriminatory conduct claims against CMRS providers. The PUCO certainly agrees with SMSA that "the views of the FCC should be heard" on these issues. Pet. at 30. But the PUCO respectfully suggests that this Court should await the FCC's interpretation of the statute at issue before reviewing, in another case, the legal issues presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

In the
Court of Common Pleas
Cuyahoga County, Ohio

Westside Cellular, Inc., d/ba Cellnet of Ohio Cellnet	:	Case No: CV-01-428050
Plaintiff,	:	Judge: Timothy J. McGinty
v.	:	
New Par, et al	:	JOURNAL ENTRY
Defendant.	:	

89 DIS. W/PREJ – FINAL

All claims and counterclaims settled and dismissed with prejudice. Each party to bear its own attorneys' fees and costs. Final. Court cost assessed as each their own.

/s/
Judge Signature

Date: April 2, 2003

APPENDIX B

In The
Supreme Court of Ohio

Cincinnati SMSA Limited Partnership,	:	Case No. 01-1158
Appellant	:	
v.	:	ENTRY
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

This cause is pending before the Court as an appeal from the Public Utilities Commission of Ohio. Upon consideration of appellant's motion for stay of trial pending appeal,

IT IS ORDERED by the Court that the motion for stay of trial pending appeal be, and hereby is, granted.

(P.U.C.O.; No. 931758RCCSS)

/s/
THOMAS J. MOYER
Chief Justice

AUG 1 1 2003

No. 02-1711

In the Supreme Court of the United States

CINCINNATI SMSA LIMITED PARTNERSHIP,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent PUCO's principal argument against review is the assertion that "the case is moot" because CLP settled the separate damages action brought by Cellnet following the PUCO's decision. PUCO Opp. 1. But this case is not moot and was not affected by the settlement of the damages action, which was an independent proceeding to which the PUCO was never a party. CLP seeks review of the operative (and only relevant) judgment on the questions presented: the Ohio Supreme Court's decision that Section 332(c)(3)(A) does not preempt the claims that CLP engaged in rate discrimination and failed to separate its wholesale and retail business operations, as required by Ohio law.

That judgment has exposed CLP to enormous potential liability, as we have explained (Pet. 28-30) and the PUCO does not seriously dispute. The fact that the PUCO has decided that it will not prospectively enforce the Ohio statutory prohibition on rate discrimination or the separation requirement for wholesale and retail CMRS operations does not lessen CLP's exposure to claims based on the PUCO's findings that CLP violated Ohio law for an extended period of time by failing to separate its wholesale and retail operations and that, as a result, CLP's hypothetical "internal wholesale rate" was zero for CMRS. The prospect of treble damages liability based on those findings, which have been affirmed by the Ohio Supreme Court, is both a substantial threat to CLP and a significant inducement to CMRS resellers, like Cellnet. That is the only reason Cellnet would expend the resources to file a brief in opposition to CLP's certiorari petition in a case that Cellnet tries to argue is moot and purely of academic interest and in which it claims to have no future financial interest (Cellnet Opp. 14-16).

The Ohio Supreme Court's decision on the preemption questions in this case — which the PUCO makes only a token effort to defend — not only burdens CLP but frustrates the

congressional goal of uniform national regulation of the "entry of" and the "rates charged by" CMRS providers, which is vital to the Nation's telecommunications policy, as explained in the *amicus* brief of the Cellular Telecommunications & Internet Association. See CTIA *Amicus* Br. 2-7. Moreover, the decision undermines the regulatory authority of the FCC, which should be heard on these issues before the Ohio Supreme Court's decision is allowed to become final. Review by this Court in these circumstances is plainly warranted.

I. THIS CASE IS NOT MOOT AND PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE IMPORTANT FEDERAL ISSUES DECIDED BY THE OHIO SUPREME COURT

A. CLP's Settlement With Cellnet Does Not Render The Case Moot.

The damages action by Cellnet was a direct and inevitable outgrowth of the PUCO's decision (Pet. 15, 29), and the potential precursor of similar actions by other CMRS resellers against CLP and other CMRS wholesalers, but that action was independent of this case and its settlement could not moot this case. Whether or not Cellnet ever filed a separate damages action, CLP was adversely affected by the PUCO's decision here, which was a declaratory ruling on the state and federal issues presented. As with any declaratory judgment of this nature, CLP faces the threat of future liability in light of the Ohio Supreme Court's affirmance of that decision. And this Court has jurisdiction to review the federal issues decided in the declaratory proceeding affecting CLP's current rights and liabilities. See *Public Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U.S. 237, 245-247 (1952).

After the Ohio Supreme Court held that Section 332(c)(3)(A) does not preempt the state-law claims adjudicated by the PUCO, the trial judge presiding over Cellnet's

damages action had no authority to reconsider that holding. The trial court also had to accept the PUCO's factual finding, affirmed by the Ohio Supreme Court, that CLP's "internal wholesale rate" was zero, which leads to the absurd conclusion that CLP had "overcharged" Cellnet by failing to provide its services for free. Faced with treble damages liability calculated on this basis, CLP was forced to settle Cellnet's claim.

Contrary to the PUCO's suggestion (Opp. 12-16), the Ohio Supreme Court's decision has continuing practical significance for CLP after the settlement of the Cellnet damages case. The PUCO does not dispute that there is no statute of limitations on claims of rate discrimination and failure to maintain separate wholesale and retail CMRS operations. As we have demonstrated (Pet. 29), any reseller that paid (or was asked to pay) any amount at all for wireless services from CLP could present a claim of discrimination based on the PUCO's finding that CLP's "internal wholesale rate" was zero.[1]

And any reseller that filed a discrimination complaint with the PUCO and received a favorable determination could then seek to file an action for treble damages under Ohio Rev. Code § 4905.61.[2] The same limitations that constrained the trial court and CLP in the Cellnet damages case would also constrain the trial court and CLP in future damages actions.

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[1] CLP does not concede that it would have no defenses against litigation of these types of claims, including due process, equitable, and other arguments. Nonetheless, the threat of such litigation is real and damaging to CLP.

[2] The PUCO's assertion (Opp. 17) that the "odds are slim" that future cases will be filed against CLP because none was filed in "the six years the *Cellnet* case was pending before the PUCO" is disingenuous. The prospects for such cases became real only after the Ohio Supreme Court's recent decision affirming the PUCO's federal preemption ruling and its finding that CLP's "internal wholesale rate" was zero.

All of these harms stem from the PUCO's declaratory ruling on state-law claims that the Ohio Supreme Court erroneously held were not preempted by federal law. The only effective recourse for CLP to reverse the underlying federal preemption holding was to petition for review by this Court of the Ohio Supreme Court's decision in this case — to which the PUCO was a party and in which the preemption issues were fully briefed, argued, and decided.

The case has even broader significance for any CMRS provider in Ohio that failed to separate completely its wholesale and retail operations — and the PUCO does not dispute that there are many in addition to CLP. Each of these CMRS providers will be subject to the same treble damages exposure under Ohio law as CLP. The potential effect of this liability on CMRS providers would be devastating.

B. The PUCO's Prospective Suspension Of The State-Law Rules At Issue Does Not Lessen The Effect Of The Ohio Supreme Court's Decision On CLP's Potential Liability.

The PUCO also asserts (Opp. 17) that it "has ended enforcement of the[] regulations" at issue here "against CMRS providers in Ohio."[3] But that suspension is prospective only (PUCO Opp. 16), and does not limit the exposure to liability that the Ohio Supreme Court's preemption ruling has created

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[3] The PUCO's suspension was based on its current assessment of the "Ohio CMRS markets" and not on any permanent or immutable concerns about the efficacy or legality of state-law rate discrimination claims against CMRS providers or the separation requirement for CMRS wholesalers. *In the Matter of the Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC LEXIS 745, at *41 (PUCO Dec. 16, 1999). The PUCO's assessment of the markets could change and the requirements at issues here could be reimposed at any time.

for CLP. Because Ohio has not "completely and irrevocably eradicated the effects" of this preemption decision, the case is not moot, *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), and review by this Court is necessary and appropriate in light of the importance of the preemption questions presented.

II. THE OHIO SUPREME COURT'S DECISION UNDERMINES FEDERAL PREEMPTION OF STATE RATE REGULATION

The PUCO has little to say about the merits of the Ohio Supreme Court's preemption decision and the conflict between that court's analysis and decisions of this Court and other federal and state courts on federal preemption of state rate regulation.

A. Rate Discrimination Claims Are A Form Of Preempted Rate Regulation.

Section 332(c)(3)(A) implements a congressional policy of allowing competitive markets to set CMRS rates without state interference: "no State * * * shall have any authority to regulate * * * the rates charged by any" CMRS provider. See Pet. 3-7 In adopting this provision, Congress expressly exempted CMRS providers from the tariff filing requirements of the Communications Act. See 47 U.S.C. § 332(c)(1)(A). Thus, Congress substituted one form of rate-setting (market competition) for another (filed tariffs), and both forms of rate-setting preempt state law, including state-law rate discrimination claims (see Pet. 17-26).

As we have demonstrated (Pet. 18-21), this Court in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil*, 204 U.S. 426 (1907), and numerous subsequent cases, see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 307-308 (1988); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578-585 (1981), has consistently held that state-law rate discrimination claims are

a form of rate regulation. Under *Abilene Cotton*, an "unreasonable rate" claim is preempted where it conflicts with federal regulation of rates. *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976).

The PUCO agrees that "in *Abilene Cotton*, the Court held a state law unreasonable rate discrimination claim to be preempted by federal law," but maintains that the rule of *Abilene Cotton* is limited to cases involving preemption "based on the existence of filed tariffs." PUCO Opp. 19. The method of federal regulation in *Abilene Cotton* (*i.e.*, filed tariffs reviewed by the ICC), however, was irrelevant to the Court's holding. The dispositive fact was that state-law rate discrimination claims are a form of rate regulation and inconsistent with exclusive federal control of how rates are set. See *Hall*, 453 U.S. at 585 (state-law authority preempted where Congress "has granted exclusive authority over rate regulation to the Commission").

In *Abilene Cotton*, the exclusive federal control over rates was vested in the ICC through filed tariffs. For CMRS, Congress has exercised exclusive federal control over rates by mandating that they be set by market forces and excluding "*any* authority" for the states to regulate rates. In either case, state-law rate discrimination claims are a form of rate regulation inconsistent with the exclusive federal control exercised by Congress.

In conflict with the *Abilene Cotton* line of cases, the Ohio Supreme Court erred in holding that the PUCO's adjudication of rate discrimination claims is not preempted by Section 332. Here, as in *Abilene Cotton*, the State seeks to impose its own determination of the "reasonableness" of a CMRS rate, despite the fact that Congress has removed "*any* authority" for the State to "regulate * * * rates" under Section 332(c)(3)(A).

The PUCO is similarly unable to distinguish the other federal and state cases cited in the petition (at 20-23) that apply a broad definition of "rate regulation" in deciding federal preemption of state-law claims. For example, the PUCO asserts that *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3d Cir. 1987), and *Alliance Shippers, Inc.* v. *Southern Pacific Transportation Co.*, 858 F.2d 567 (9th Cir. 1988), are distinguishable because the Staggers Rail Act of 1980 has "legislative history" stating that "'[n]o state law or federal or state common law remedies are available.'" PUCO Opp. 20 (quoting *G&T Terminal*, 830 F.2d at 1234). The PUCO finds no similarly "broad" statement of preemption of state law with respect to CMRS rates. Yet Section 332(c)(3)(A) (emphasis added) provides that "*no State* or local government shall have *any authority* to regulate the entry of or *the rates charged*" for CMRS. It is difficult to imagine broader or more emphatic statutory language preempting state rate regulation (as opposed to the mere "legislative history" of the Staggers Rail Act of 1980 cited by the PUCO).

B. Ohio's Separation And Record-Keeping Requirements Regulate Market Entry.

The PUCO offers even less in defense of the separation and record-keeping requirements enforced against CLP in this case. As we have demonstrated (Pet. 26-27), the PUCO itself previously concluded that these requirements regulated market "entry," finding (in its decision suspending the requirements prospectively) that CMRS providers would "be restricted from entering the Ohio market as a result of [the] mandated structural organization" of separate wholesale and retail business operations. *Structural Order*, *supra*, at *4; see Pet. 9 n. 3.

In the face of this statement, the PUCO now baldly asserts without any support or analysis (Opp. 22 n.7) that its "passing comment" did "not transform" the "requirement that CMRS

providers maintain separate wholesale and retail operations" "into a market entry regulation." But, as the cases cited in the petition (at. 27-28) demonstrated, the imposition of requirements that must be satisfied before a CMRS provider may legally operate in a state is "regulat[ing] the entry" of CMRS providers.

In addition, the PUCO's requirement of separate operations and accounting for CMRS wholesale and retail services conflicts directly with two FCC decisions rejecting that very requirement. See Pet. 27-28 (citing *Resale NPRM* at ¶¶ 42-55; *Resale Order* at ¶ 12). The PUCO argues that these FCC decisions show no purpose, policy, or intent on the part of the federal government to preempt state rules on these issues because one of the cited FCC orders refers "to a then-existing California PUC separation requirement." Opp. 23 n.8 (citing *Cellular Resale NPRM and Order*, 6 F.C.C.R. 1719 (1991)). But the FCC order referred to by the PUCO does not approve of the California requirement, and the FCC order predates (1991) the preemption provision in Section 332 proscribing the regulation of market entry, which was enacted in 1993.

Finally, Cellnet asserts that CLP "lacks standing" to challenge any regulation of market entry by Ohio because those regulations did not prevent CLP from entering the market. Cellnet Opp. 18 ("Petitioner cannot possible claim standing to argue that Ohio's rules regulated market entry because Petitioner was the very first market entrant"). Section 332, however, does not prohibit only successful market entry barriers. It prohibits a state from "regulat[ing] the entry of" CMRS providers. And Ohio surely regulated market entry when it required CMRS providers to separate their wholesale and retail operations before operating legally in the State.

III. THE FEDERAL PREEMPTION ISSUES IN THIS CASE ARE PROFOUNDLY IMPORTANT TO THE NATIONAL TELECOMMUNICATIONS INDUSTRY AND REQUIRE REVIEW BY THIS COURT

As described in the petition (at 1-3, 6-7, 28-30), and in the CTIA *amicus* brief, the preemption issues presented in this case are of profound importance to the national telecommunications industry. The Ohio Supreme Court's decision on these issues conflicts with the congressional goal of a uniform national regulatory regime for CMRS rates, with a focus on competition and investment. The decision will encourage other states, which have already "begun to assert their authority over wireless rates and entry in the guise of consumer protection," to expand that authority at the expense of national uniformity. CTIA *Amicus* Br. 8, 12.

In particular, the FCC's jurisdiction will be compromised if Ohio and other states have authority to decide rate discrimination claims and to impose structural requirements rejected by the FCC as a condition to market entry. For this reason, we agree with the PUCO that the FCC should be heard on the preemption questions presented in this case, PUCO Opp. 2 (the PUCO acknowledges that the FCC has "yet to consider" the issues), although we disagree on the timing. The FCC should be heard (through an invitation to the Solicitor General) before the Ohio Supreme Court's decision is allowed to become final.

Otherwise, if allowed to stand, the Ohio Supreme Court's preemption analysis will undermine the congressional scheme of competitively set CMRS rates overseen by the FCC. The effect of this regulatory turmoil on CMRS providers would weaken the Nation's telecommunications infrastructure, which is a bedrock of the national economy. As CTIA concludes (Br. 7), the Ohio Supreme Court's decision has "the potential to force wireless carriers to adhere to fifty plus different sets of

rules instead of allowing them to pass on to consumers the savings gained from the exploitation of nationwide business models."

In conflict with decisions of this Court and lower federal and state courts, the Ohio Supreme Court has turned federal preemption law upside down, authorizing state regulation — backed by the threat of treble damages — in a field that Congress has reserved to the federal government. Review by this Court is necessary to effectuate Congress's intent in devising a regulatory program for CMRS.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CINCINNATI SMSA LIMITED PARTNERSHIP,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF *AMICUS CURIAE* OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Cellular Telecommunications & Internet Association ("CTIA") is the international organization of the wireless communications industry for both wireless carriers and manufacturers.[1] Membership in the association covers commercial mobile radio service ("CMRS") providers[2] and manufac-

[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its members made any monetary contribution to the preparation or submission of this brief.

[2] CMRS includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial

turers. CTIA represents more broadband Personal Communications Service carriers and more cellular carriers than any other trade association. As such, CTIA is uniquely situated to represent the interests of the wireless industry with respect to the pending petition for writ of certiorari.[3]

REASONS FOR GRANTING THE PETITION

Wireless providers are an "integral part of the national telecommunications infrastructure" and, "by their nature, operate without regard to state lines." H.R. REP. NO. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587. Given the inherently interstate nature of wireless services and their increasing importance to the economy, Congress recognized that allowing the creation of more than fifty disparate regimes for rate and entry regulation would inhibit the wireless industry's growth, undermine competition, and harm consumers. Congress therefore expressly preempted states from regulating the rates charged by wireless carriers or their entry into the marketplace.

Congress provided states with limited jurisdiction to regulate "the other terms and conditions" of wireless services, but some states have been using this delegation as a backdoor means to assert authority over wireless rates and entry. The Public Utilities Commission of Ohio's (the "PUCO's") decision in the lawsuit below, as affirmed by the Ohio Supreme Court, is a case in point. The PUCO adjudicated a complaint

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portion of the public." 47 U.S.C. § 332(d)(1) (2003); *see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 F.C.C.R. 1411, 1443-63, 1508 (1994) ("*CMRS Second Report and Order*") (CMRS encompasses cellular service, personal communications service, paging, airplane telephone service, and certain mobile satellite services).

[3] CTIA has obtained consent from the Petitioner and the Respondent to file this brief.

alleging unreasonable rate discrimination, found that Petitioner had violated Ohio law, calculated how much the complainant had been "overcharged," and enforced a separate affiliate requirement for wholesale and retail CMRS operations. Based on the PUCO's findings, an Ohic trial court ruled that the complainant was entitled to damages in the amount of the so-called overcharges and lost profits.

Each of Ohio's decisions in this case—the PUCO's in assessing the reasonableness of Petitioner's charges, the Ohio Supreme Court's in upholding the state agency's unlawful assumption of jurisdiction, and the Ohio trial court's award of damages—while framed as the adjudication of a rate discrimination claim, is in fact tantamount to the state rate regulation proscribed by federal law. Courts and the FCC have consistently held that if a complaint challenges the reasonableness of a wireless rate—even if the claim alleges that the rate is unreasonably discriminatory—states lack jurisdiction to hear it. Moreover, as this Court has made clear, the term "rates" must be interpreted broadly because rates are significant only to the extent one knows what service is being provided in return.

Although Ohio's actions are especially blatant violations of the prohibition against state ratemaking and entry regulation, a number of other states and plaintiffs asserting state-law causes of action also have begun chipping away at the boundaries established by Congress. It was to avoid a patchwork of precisely this kind of regulation that Congress preempted states from imposing their traditional telecommunications regimes on wireless operations. Accordingly, CTIA urges this Court to grant the petition and reverse the decision of the Ohio Supreme Court.

I. STATES ARE FORBIDDEN FROM ENGAGING IN RATE REGULATION OF WIRELESS CARRIERS

A. Congress Created a New Regulatory Paradigm for Wireless Services in Section 332

Seeking to promote competition in an industry that already was exhibiting the potential for extraordinary growth and innovation, in 1993, Congress amended the Communications Act[4] "to dramatically revise the regulation of the wireless telecommunications industry." *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998). The statutory amendments reduced regulation by, among other things, establishing a comprehensive and consistent national regulatory framework for the various types of wireless providers and gave the Federal Communications Commission ("FCC") flexibility to modulate the levels of regulation based on market conditions.

The most significant aspect of the 1993 changes was Congress's express preemption of states from regulating wireless rates or entry:

> Notwithstanding section[] 2(b) [which otherwise gives states jurisdiction over intrastate rates] . . . no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A). Section 332(c)(3) demonstrates "an unambiguous congressional intent to foreclose state regulation in the first instance [and] reflects a general

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[4] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

preference in favor of reliance on market forces rather than regulation." *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services*, Report and Order, 10 F.C.C.R. 7842, 7844 ¶ 8 (1995) ("*Ohio CMRS Order*"), *recon. denied*, Order on Reconsideration, 10 F.C.C.R. 12427 (1995). Although states may continue to regulate the "other terms and conditions" of wireless service, such residual authority is necessarily limited. To the extent a state touches on rate or entry regulation, it is not an *other* term or condition and it is not permissible.

Ohio has been rebuffed twice in its attempt to maintain jurisdiction over wireless rates, which section 332(c)(1)(B) permits only if a state can demonstrate the existence of certain conditions. *See Ohio CMRS Order*, 10 F.C.C.R. 7842.[5]

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[5] 47 U.S.C. § 332(c)(1)(B) (permitting states that regulated wireless rates before enactment of the 1993 restrictions to continue regulation if they could demonstrate to the FCC that market conditions fail to protect consumers from unjust and unreasonable rates and practices). None of the other six petitioning states was granted such approval either. *See Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana,* Report and Order, 10 F.C.C.R. 7898 (1995); *Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services; Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Report and Order and Order on Reconsideration, 10 F.C.C.R. 7824 (1995); *Petition of New York State Public Service Commission To Extend Rate Regulation*, Report and Order, 10 F.C.C.R. 8187 (1995); *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, 10 F.C.C.R. 7486 (1995), *recon. denied*, Order on Reconsideration, 11 F.C.C.R. 796 (1995); *Petition of the Connecticut Department Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, Report and Order, 10 F.C.C.R. 7025 (1995), *aff'd sub nom. Connecticut Dep't Pub. Util. Control v. FCC*, 78 F.3d 842 (2d Cir. 1996); *Petition on Behalf of the State of Hawaii, Public Utility*

The FCC held that "given the rapidly evolving market structure in which mobile services are provided," the PUCO had not met its heavy burden of demonstrating that "the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory." *Ohio CMRS Order*, 10 F.C.C.R. at 7843 ¶ 6. In light of the addition of five or six new wireless competitors in almost every market in the decade since the PUCO made its request, as well as the hundreds of new services and innovative rates plans carriers have introduced, the burden imposed on Ohio and other states seeking to increase their involvement in wireless regulation has only gotten heavier.

B. Congress's Deregulatory Scheme Benefits Wireless Competition and CMRS Consumers

Congress's expectation that a uniform national regulatory regime would foster growth and benefit wireless consumers has been borne out. As of December 2002, CMRS providers had over 140 million subscribers and more than 190,000 employees in the United States. *See* Cellular Telecomm. & Internet Ass'n, *Semi-Annual Wireless Industry Survey Results June 1985—December 2002*, *available at* http://www.wow-com.com/industry/stats/surveys/ (last visited June 18, 2003). Wireless carriers have devised flexible rate plans and pricing strategies to attract customers and respond to changes in market demand, and there are more service options available more now than ever before. *See* Dan Meyer, *Carriers Try To Pick up Marginal Users With Cheap Calling Plans*, RCR WIRELESS NEWS, Mar. 11, 2002, at 3. Because new applications such as "Wireless Internet, third generation services, unlicensed wireless network hubs, text messaging and the

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Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, Report and Order, 10 F.C.C.R. 7872 (1995).

introduction of complex games and entertainment products are driving the use of wireless networks" wireless infrastructure spending is expected to rise between four and five percent in the next two to three years. Sam Omatseye, *Uptake in Services Will Require Infrastructure Spending,* RCR WIRELESS NEWS, Apr. 7, 2003, at 16. Today, there are six nationwide mobile telephony operators in the United States and the price wars among those carriers can be fairly characterized "as 'competitive,' 'intense,' and 'aggressive.'" *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Seventh Report, 17 F.C.C.R. 12985, 12990, 13012 (2002).

The FCC's guiding principle in implementing section 332 was that the CMRS market should be "driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs—and not by strategies in the regulatory arena." *CMRS Second Report and Order*, 9 F.C.C.R. at 1420 ¶ 19. This goal is wholly undermined by state actions, such as the PUCO's, that have the potential to force wireless carriers to adhere to fifty plus different sets of rules instead of allowing them to pass on to consumers the savings gained from the exploitation of nationwide business models.

II. THE OHIO SUPREME COURT'S DECISION HAS NATIONAL CONSEQUENCES

The PUCO's decision to rule on a complaint challenging the reasonableness of Petitioner's rates for wireless services was a direct violation of section 332(c)'s express preemption provision and should be reversed. Ohio's defiance of the boundaries drawn by Congress, however, potentially has adverse ramifications far beyond the state's borders and for many more wireless carriers than the petitioner in this case.

If the Ohio Supreme Court's order affirming the state agency's impermissible action is allowed to stand, there is a strong possibility that other states will view it as a green light to implement or enforce policies that similarly fail to respect section 332(c)'s restrictions on their power.

Considered in the context of the goals Congress hoped to accomplish through preemption of state authority over wireless rates and entry, there is little question that the state's residual jurisdiction over "other terms and conditions" must be read narrowly. If Congress's express directive that states have no role in wireless rate or entry regulation is to have any meaning, "rate" and "entry" cannot be considered mere subsets of "*other* terms and conditions."

A. The Ohio Decision Regulates Wireless Rates in Direct Violation of Section 332

The PUCO's actions in the case at bar are not at all close to the line between "rates" and "other terms and conditions." On the contrary, the agency proceeding that gave rise to this case was the adjudication of a complaint directly alleging unreasonable wireless rates, which is unmistakably rate regulation. *See Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 432, 440-42 (1907); *see also T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959) (the "crucial question of reasonableness could not be decided by courts"). "To the extent that there is complaint of the unreasonableness of the rate . . . [e]ven if the complaint is that the rate is *discriminatory*," state agencies lack jurisdiction to hear it. *ITT World Communications, Inc. v. New York Tel. Co.*, 381 F. Supp. 113, 119 (S.D.N.Y. 1974) (emphasis in original) (citing *Abilene Cotton*, 204 U.S. at 448); *see also Fedor v. Cingular Wireless Corp.*, No. 01-CV-6849, 2002 U.S. Dist. LEXIS 14786, at *5 (N.D. Ill. Aug. 12, 2002) (challenge to the reasonableness of a wireless carrier's rates is completely preempted by section 332(c)); *Gilmore v. Southwestern Bell*

Mobile Sys., L.L.C., 210 F.R.D. 212, 221 (N.D. Ill. 2001) (questions regarding the reasonableness of rates "are generally within the particular expertise of the FCC and the regulation of such involves exercising agency discretion.").

The PUCO's determination that it was acting under its "other terms and conditions" authority is not supported by the statutory language or the case law interpreting section 332(c). Although the statute's legislative history lists "the requirement that carriers make capacity available on a wholesale basis," among the terms and conditions that states may oversee (H.R. REP. NO. 103-111, at 261) the FCC explicitly rejected the PUCO's attempt to interpret that legislative statement as giving the agency permission "to ensure that wholesale cellular rates [in Ohio] are not below cost through its complaint authority." *Ohio CMRS Order*, 10 F.C.C.R. at 7852 ¶ 43. The FCC explained that "Ohio may not prescribe, set, or fix rates in the future because it has lost authority to regulate 'the rates charged' for CMRS rates . . . ." *Ohio CMRS Order*, 10 F.C.C.R. at 7852 ¶ 43.

Here, the complainant asked the PUCO "to make an outright determination of whether a price charged for a CMRS service was unreasonable," which is precisely what state agencies are "preempted from doing . . . by [s]ection 332." *Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, As Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts From Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) from Violating State Consumer Protection Laws Prohibiting False Advertising and other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated under State Contract and Torts Laws*, Memorandum Opinion and Order, 15 F.C.C.R. 17021, 17035 ¶ 25 (2000). "[A] claim that directly challenges a rate

and seeks a remedy to limit or control the rate prospectively or retrospectively is an attempt to regulate rates . . . ." *Spielholz v. Superior Court of Los Angeles County*, 104 Cal. Rptr. 2d 197, 204 (Cal. Ct. App. 2001). It therefore cannot also be considered an effort to regulate "carrier practices, separate and apart from their rates." *Ohio CMRS Order*, 10 F.C.C.R. at 7852 ¶ 43.

B. The Ohio Decision Regulates Wireless Entry in Contravention of Section 332

Although states retain "traditional authority to monitor commercial activities within [their] borders," section 332(c) bars states from imposing requirements on wireless providers that must be satisfied before the provider may legally operate in the state. *Ohio CMRS Order*, 10 F.C.C.R. at 7853 ¶ 44. State law is preempted when it "tread[s] directly on the very areas reserved to the FCC: the modes and conditions under which [a wireless provider] may begin offering service." *Bastien v. AT&T Wireless Servs., Inc.* 205 F.3d 983, 989 (7th Cir. 2000); *see also TPS Utilicom Servs., Inc. v. AT&T Corp.*, 223 F. Supp. 2d 1089, 1108 (C.D. Cal. 2002) (express preemption in section 332(c) "prevents second guessing" of FCC criteria for wireless licensing). As the FCC found in rejecting the PUCO's petition seeking to regulate CMRS providers in Ohio, "the statutory language is not broad enough to accommodate Ohio's apparent interest in asserting authority to regulate marketplace entry by CMRS providers." *Ohio CMRS Order*, 10 F.C.C.R. at 7853 ¶ 45.

The FCC has determined that section 332 precludes not only a regulation that directly prohibits entry but also one that "effectively precludes CMRS entry." *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 F.C.C.R. 9610, 9638 ¶ 80 (2001) (citing *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed

Rulemaking, 11 F.C.C.R. 5020, 5072-73 ¶ 111 (1996)); *Aubrey v. Ameritech Mobile Communications, Inc.*, No. 00-CV-75080, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 17, 2002) (section 332(c) preempts states from determining what technology wireless providers must use to serve a particular market). The PUCO's separate subsidiary requirement is impermissible under this standard because it prevents wireless providers in Ohio from lawfully selling their services both to resellers and directly to the public. Indeed, even the PUCO acknowledged that this rule could unreasonably prevent the sale of wireless services—in 1999 it eliminated the separate subsidiary requirement in order "to ensure that no company will be restricted from entering the Ohio market as a result of a mandated structural organization." *Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC LEXIS 745, at *41 ¶ 2 (Dec. 16, 1999).

C. Review by this Court Is Necessary To Prevent the Destruction of Congress' Carefully Balanced Wireless Regulatory Regime

The PUCO has not been alone in its efforts to intrude in areas placed off limits by section 332(c). A number of other states, as well as courts adjudicating state-law causes of action, also have taken actions in recent years that conflate the line between "rate and entry" and "other terms and conditions."

For example, both state and federal courts often permit the "other terms and conditions" exception of section 332(c) to swallow the provision's express preemption directive by refusing to bar lawsuits so long as plaintiffs cast their state-law claims for restitution in terms of fraud, unfair practices, or non-disclosure. *See, e.g., Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp. 2d 421, 423 (D. Md. 2000) ("late fees are not included in 'rates' of service, but rather are part

of the 'other terms and conditions' of service" because late fees are intended to act as a penalty for late payment); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541 (D.N.J. 1996) (award of monetary damages based on state deceptive advertising or non-disclosure claims is not rate regulation); *Lee v. Contel Cellular of the South, Inc.*, No. CV-95-1057-JH, 1996 U.S. Dist. LEXIS 19636 (S.D. Ala. Nov. 25, 1996) (assessment of "rounding" practice in calculating bills is unlawful rate regulation under section 332(c), but state fraud and deceptive practices claims asking for the same relief implicate "other terms and conditions"); *Bryceland v. AT&T Corp.*, No. 05-01-00552-CV, 2002 Tex. App. LEXIS 8511 (Tex. App. Dec. 3, 2002) (fraud, deceptive practices and breach of contract are not preempted); *Ball v. GTE Mobilnet of California*, 96 Cal. Rptr. 2d 801 (Cal. Ct. App. 2000) (state unfair business practice claims relating to inadequate disclosure or misrepresentation not preempted). In declining to preempt the state-law complaints, these decisions ignore the guidance provided by this Court that the "rates charged by" language of the Communications Act must be construed broadly. *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) ("[R]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.").

Some state regulators also have begun to assert their authority over wireless rates and entry in the guise of "consumer protection." The California Public Utilities Commission, for instance, recently proposed sweeping regulations that would, among other things, dictate the maximum level of late payment charges, excuse customers from paying early termination fees, mandate the payment of five percent interest on the monthly unused balance of a customer deposit, and require wireless carriers to seek the state commission's approval before introducing any new services with "privacy

implications." *See* Rulemaking 00-02-004, *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, Draft Decision of Commissioner Wood (Cal. PUC June 6, 2002) ("*California Draft Decision*"). Other states are watching California's actions carefully and, absent a clear directive from this Court, there exists the strong probability that wireless carriers will be sucked into the traditional state-by-state regulatory regime that Congress sought to "dramatically revise" a decade ago.

Congress preempted a patchwork of state regulatory schemes because, as one court has explained, "'the risk of fifty different states articulating fifty different rules' . . . conflicts with Congress's objectives of achieving national uniformity in wireless telecommunications services . . . ." *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*, 248 F. Supp. 2d 452, 463 (D. Md. 2003) (quoting *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*, 216 F. Supp. 2d 474, 491 (D. Md. 2002)). In light of the conflict among the courts on this issue and the potential for further over-stepping by all states, not just Ohio, review by this Court is necessary to clarify the boundary beyond which states may not stray.

III. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH CONGRESSIONAL GOALS

Even if the PUCO's actions were not expressly preempted under section 332(c), they are not permissible because they directly conflict with "the careful regulatory scheme established by federal law." *United States v. Locke*, 529 U.S. 89, 106-07 (2000); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000); *see also Central Office Tel., Inc.*, 524 U.S. at 227-28. Federal regulations preempt state law to the extent there is an "actual conflict" between the two regimes. *Geier*, 529 U.S. at 871-72. The Supremacy Clause

invalidates not only conflicting state laws "that make it 'impossible' for private parties to comply with both state and federal law," it nullifies state laws "that prevent or frustrate the accomplishment of a federal objective." *Id.* at 873-74; *see also TPS Utilicom Servs., Inc.*, 223 F. Supp. 2d at 1109 (lawsuit involving FCC auction of spectrum licenses pre-empted because it "would interfere with Congress's full purpose and objectives under the [Communications Act]").

The FCC, in implementing the Communications Act, has twice *rejected* the same kind of separate wholesale/retail subsidiary requirement established by the PUCO and to which Petitioner was found by the Ohio Supreme Court to have violated. *See Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Notice of Proposed Rulemaking and Order, 6 F.C.C.R. 1719, 1725 ¶ 52 (1991) ("*Resale NPRM and Order*"); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 F.C.C.R. 18455, 18462-63 ¶ 12 (1996) ("*CMRS Interconnection Order*"). In declining to adopt a separate affiliate requirement, the FCC noted that it would not "be wise policy at this time to consider the need for separate accounting for wholesale/retail operations, regulate wholesale rates of return or require that rate cards be filed with the Commission." *Resale NPRM and Order*, 6 F.C.C.R. at 1725 ¶ 52. The FCC found that imposing such requirements on wireless providers "could lead to pricing distortion, including possible higher prices" and undermine its goals of "encouraging entry and promoting competition in the marketplace." *Id.* at 1722, 1725 ¶¶ 23, 53; *CMRS Interconnection Order*, 11 F.C.C.R. at 18462 ¶ 12 (reaffirming its previous ruling that "the rule does not require providers to structure their operations or offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures . . . .").

In *Geier*, this Court, noting that the Department of Transportation had previously "*rejected*" the very standard plaintiff sought to apply in her lawsuit, concluded that "a rule of state tort law imposing such a duty . . . would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Geier*, 529 U.S. at 879, 881 (emphasis in original). The FCC, likewise, made a deliberate decision to leave wireless services free from traditional separation requirements because such regulations would "be counterproductive" to the FCC's goals and had the potential to "circumvent competition-driven investment" in the wireless market. *Resale Order and NPRM*, 6 F.C.C.R. at 1725 ¶ 53. The PUCO's separate subsidiary requirement, accordingly, is preempted "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Ohio's intrusion into wireless ratemaking also conflicts with explicit congressional intent. As discussed above, Congress created a "uniform national policy" to "promote competition for wireless services" and to avoid "State regulation [that may] be a barrier to the development of competition in the market." H.R. REP. NO. 103-213, at 480-81 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 1169-70 (incorporating the findings of S.335, 103d CONG. (1993)); H.R. REP. NO. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587. In implementing section 332(c), the FCC similarly sought to ensure that its regulations would be "perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services rather than as a burden standing in the way of entrepreneurial opportunities." *CMRS Second Report and Order*, 9 F.C.C.R. at 1421 ¶ 22. The PUCO's broad foray into wireless regulation, by contrast, threatens to create a competition-inhibiting "policy that is balkanized state-by-state." *Ohio CMRS Order*, 10 F.C.C.R.

at 7852 ¶ 14. As such, neither the PUCO's order nor the Ohio Supreme Court's affirming decision can coexist with the explicit congressional objectives expressed in section 332(c) and the FCC's wireless policies.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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